No. (1)

Supreme Court, U.S.
FILED

IN THE

941930 MAY 24 1995

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—v.—,

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

Of Counsel:

Susan Buckley
Katherine B. Harrison
Jonathan Donnellan
Cahill Gordon & Reindel
(a partnership including a
professional corporation)

May 24, 1995

140 pp + 1/0

QUESTIONS PRESENTED

1. May a state, consistently with the First Amendment to the United States Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading?

2. May a state, consistently with the First Amendment to the United States Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, at the same time their critics are permitted to use the identical language about the same goods in an unrestricted manner?

PARTIES BELOW

The parties before this Court are those set forth in the caption. Since this action was initiated, one of the petitioners changed its name to American Forest & Paper Association from The American Paper Institute, Inc.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, petitioners inform the Court that they have no parent companies and no subsidiaries other than wholly-owned subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES BELOW ii

RULE 29.1 STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Factual Background of This Action 3

1. The Statute 3

2. Petitioners' Activities 5

3. The Chilling Effect of the Statute 6

B. Procedural History of This Action 7

C. The Opinions of the Courts Below 9

SUMMARY OF ARGUMENT 11

REASONS FOR GRANTING THE WRIT 13

I. THIS CASE PRESENTS IMPORTANT ISSUES WORTHY OF THIS COURT'S REVIEW CONCERNING FIRST AMENDMENT PROTECTIONS AFFORDED THE TRUTHFUL USE OF COMMON LANGUAGE BY COMMERCIAL SPEAKERS IN THE CONTEXT OF A NATIONAL POLICY DEBATE 13

PAGE

II. THE DECISION BELOW HOLDING THAT THE STATUTE IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH CONFLICTS WITH RECENT DECISIONS OF THIS COURT 16

A. California's Restrictions on the Use of Environmental Language by Commercial Speakers, as Written and as Construed by the Courts Below, Is Irrational and Does Not Directly Advance California's Interests to a Material Degree 18

B. The Existence of Several Less Restrictive Alternatives to California's Statute Establishes That There Is No Reasonable Fit Between the Statute's Means and Its Asserted Ends 22

III. CALIFORNIA'S ONE-SIDED STATUTORY RESTRICTION ON THE USE OF CRITICAL ENVIRONMENTAL LANGUAGE BY "FOR PROFIT" SPEAKERS IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF VIEWPOINT CONTRARY TO THIS COURT'S TEACHINGS IN *R.A.V.* v. *CITY OF ST. PAUL* 25

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	PAGE
Bates v. *State Bar of Arizona*, 433 U.S. 350 (1977) ...	22
Board of Trustees v. *Fox*, 492 U.S. 469 (1989)	22
Boos v. *Barry*, 485 U.S. 312 (1988)	27
Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980)	9-10, 12, 14, 16-18, 22
Cincinnati v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993)	9, 16-17, 20, 22-23, 26
Citizens United for Free Speech II v. *Long Beach Township Board of Commissioners*, 802 F. Supp. 1223 (D.N.J. 1992)	26
Edenfield v. *Fane*, 113 S. Ct. 1792 (1993)	9-10, 16-17, 20-21
44 Liquormart, Inc. v. *Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W. 3786 (U.S. May 1, 1995) (No. 94-1140).....	16n
Ibanez v. *Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994)	9-10, 16-17, 20-21
MD II Entertainment, Inc. v. *City of Dallas*, 28 F.3d 492 (5th Cir. 1994).....	26
Peel v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990).....	17
R.A.V. v. *City of St. Paul*, 112 S. Ct. 2538 (1992)	12, 25-27

PAGE

Rubin v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).....9-10, 12, 14-24, 24n, 27

Shapero v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988) .. 17-18

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).... 22

Administrative Materials

FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (1994)..... 24

Constitutional Provisions

U.S. Const. Amend I .....*passim*

U.S. Const. Amend XIV 2

Rules

Fed. R. Civ. P. Rule 24(a)..... 8

Statutes

Cal. Bus. & Prof. Code
§ 17500 (West 1987) 2, 24
§ 17508 (West Supp. 1995) 2, 24
§ 17508.5 (West Supp. 1995) .....*passim*

Civil Rights Law
42 U.S.C. § 1983 (1988) 2

Judicial Code
28 U.S.C. § 1254(1) (1988) 2
28 U.S.C. § 2201 (1988 & Supp. V 1993) 2, 8
28 U.S.C. § 2202 (1988) 2, 8

Me. Rev. Stat. Ann. tit. 38, § 2142 (West Supp. 1994) . 24

PAGE

Other Authorities

Steven W. Colford, *Fade Out For Green*, Advertising Age, Dec. 5, 1994, p. 1 ..... 14n

John Flinn, *Advertisers Take On Labeling Law; Seeing Red Over Green*, San Francisco Examiner, Jan. 3, 1995, C-1..... 14n

State Recycling Laws Update, Environmental Labeling Update 1994 (Raymond Communications 1994)..... 14n

State Recycling Laws Update, Year-End Edition 1994 (Raymond Communications 1994)..... 14n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—against—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit that a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case, filed on November 18, 1994, rehearing and rehearing *en banc* denied on February 23, 1995.

OPINIONS BELOW

The opinion of the court of appeals, written by Choy, J., and the dissent thereto by Noonan, J., is reported at 44 F.3d 726 and is reprinted in the Appendix hereto at 1a-33a. The denial of rehearing and rehearing *en banc* (62a-63a) is unreported. The district court opinion (34a-61a) is reported at 809 F. Supp. 747.

JURISDICTION

The opinion of the court of appeals from which petitioners seek review was filed on November 18, 1994. The court of appeals denied a timely petition for rehearing with suggestion for rehearing *en banc* on February 23, 1995. This petition is being timely filed within 90 days of that denial.

The jurisdiction of this Court to review the judgment of the court of appeals is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution as well as the texts of 28 U.S.C. § 2201, 2202 (1988 & Supp. V 1993), 42 U.S.C. § 1983 (1988), and California Business and Professions Code §§ 17500, 17508, and 17508.5 (West 1987 & Supp. 1995) are set forth in the Appendix at 64a-69a and are listed in the Table of Contents thereto.

STATEMENT OF THE CASE

This petition stems from a constitutional challenge to Section 17508.5 of the California Business and Professions Code, a statute that seeks to regulate "green marketing." The statute provides that the words "recycled," "recyclable," "biodegrad-

able," "photodegradable" and "ozone friendly" may not be used by any manufacturer or distributor of consumer goods to describe those goods unless strict state-dictated statutory definitions are met. If the words are used in *any* other way—including ways entirely consistent with dictionary definitions and common usage—criminal punishments may follow. Under the statute, it is of no moment that information provided by use of the words in any way other than as prescribed by the legislature is entirely truthful and non-misleading. Nor, under the statute, is it relevant that consumers would receive *more* information about the environmental impact of products from the truthful and non-deceptive use of the now-forbidden language.

The statute permits critics of the ecologically oriented statements and behavior of manufacturers and distributors to use the state-defined terms as they like. But those subject to the statute must either use the words as prescribed or may not use them at all.

It is increasingly clear that consumers want to know how the products they buy and the packaging of those products will affect the environment. It is also clear that consumers learn about environmental attributes of goods and packages from advertisements and labels. Petitioners, who advertise and distribute consumer goods, want to speak to consumers via "green marketing." Petitioners have used and wish to continue to use the defined terms in truthful, non-deceptive ways other than as California has determined is appropriate. They are now barred, under threat of criminal sanctions, from doing so.

A. Factual Background of This Action

1. The Statute

Section 17508.5 of the California Business and Professions Code was enacted by the California legislature in 1990. As adopted, Section 17508.5 states:

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.[1] For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of

---

[1] The Federal Trade Commission has not adopted trade rules defining any of the terms addressed in Section 17508.5 which would allow plaintiffs to avoid adherence to the statute's prescribed use of the regulated terms.

this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.[2]

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

(65a-66a) Violation of Section 17508.5 is punishable by imprisonment of up to six months and/or a fine. Civil penalties are also available.

2. Petitioners' Activities

Petitioners in this action are eight non-profit trade associations, The California Chamber of Commerce, and the Chamber of Commerce of the United States. (71a-75a) Petitioners' members have distributed and continue to distribute a wide variety of consumer goods to retailers in California, many of which are used or consumed every day by consumers. (75a) Others of petitioners' members manufacture the packaging for consumer products, including paper, plastic, glass and metal. (*Id.*)

Petitioners' members advertise and communicate to the public about consumer goods, products and packaging,

---

[2] The portion of the statute defining "recyclable" was held to be unconstitutionally vague by the district court. (57a-59a) The State has not appealed that ruling.

including their environmental attributes, on product labels and in printed advertisements covered by the statute. (76a-79a) In their messages, petitioners' members have participated in the public debate on issues of solid waste disposal and protection of the environment. They have talked about their own efforts to mitigate the effects of their products and packaging on the solid waste stream. They have encouraged recycling through these messages both by educating consumers as to products and packages which can be recycled and by simply urging consumers to recycle. (*Id.*)

A typical message published in California by one of petitioners' members, Del Monte Foods Company, stated the following under the heading "PRECIOUS METAL":

> The "tin" can may just be the world's perfect container. It's made of durable, high grade steel that is completely recyclable.* It saves energy because it requires no refrigeration. And the can is made, shipped and stored more economically than other packages. So the dollars you spend go more to the food you eat than the package that contains it. The steel can. Precious little could be done to improve it.

(98a) The advertisement concluded with the phrase "Food for Thought" followed by the Del Monte name and symbol. (*Id.*) The footnoted material (*) advised:

> Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

(*Id.*)

3. The Chilling Effect of the Statute

The effect of the statute has been to eliminate rather than encourage truthful statements about the environmental attributes of consumer products. For example, Del Monte

determined that the "PRECIOUS METAL" advertisement quoted above, though truthful and accurate, could no longer be published in California as a result of the adoption of Section 17508.5. (84a) Del Monte also pulled a second advertisement that stated, under the heading "RECYCLING TIME" and a picture of a watch lying on a flattened steel can:

> This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

(99a, 84a-85a) Other companies, as well, have removed environmentally-oriented labels from their packages out of concern that they could be criminally prosecuted for making accurate statements in a manner inconsistent with the requirements of California law. (83a)[3]

As a result of the statute, no representations covered by the statute can lawfully be made that products are "biodegradable" or "photodegradable" unless that process occurs within one year—even if the language at issue specifically (and truthfully) states that the process takes 18 months. Nor can truthful representations be made that packaging contains "5% recycled content" or that it is made from recycled industrial waste, because the statute imposes a wooden definition of "recycled" that requires 10% of the package content to be "postconsumer material" in all circumstances.

B. Procedural History of This Action

Petitioners brought this action against respondent, the Attorney General of California, in February 1992, alleging

---

[3] One example cited to the courts below was the decision of Fisher Nut Company to remove from its labels a statement that the can that contained its mixed nuts was made of steel that was "recyclable where steel recycling facilities exist." (*Compare* copies annexed at the end of this petition at 100a and 101a)

that Section 17508.5 of the California Business and Professions Code violates their First Amendment rights by impermissibly restricting both commercial and non-commercial speech. Petitioners also alleged that certain of the statute's definitions were unduly vague in violation of the Due Process clause. Petitioners sought a declaration that the statute is unconstitutional and a permanent injunction against its enforcement pursuant to 28 U.S.C. §§ 2201-02.

In June 1992, based on their views about the national significance of the speech and environmental issues presented in this case and their belief that petitioners' challenge to the California statute "could cripple efforts to regulate environmental claims, both in California and elsewhere," respondents, the Environmental Defense Fund and Californians Against Waste, sought intervention as of right to defend the statute under Federal Rule of Civil Procedure 24(a). (Memorandum in Support of Motion to Intervene, Docket No. 9, at 13) The district court granted the intervention.

In July 1992, after petitioners and the Attorney General entered into a detailed stipulation of facts (70a-91a), petitioners moved for summary judgment on their claims. The Attorney General and the intervenor respondents opposed the motion on the ground that the statute is a permissible regulation of commercial speech. No claim was made that the motion should be denied on the basis of any alleged disputed issues of fact.

In an Order dated December 23, 1992 the district court held that the statute applied only to commercial speech and that the restrictions it imposed on such speech were constitutional. The court also held that the statute's definition of "recyclable" was unconstitutionally vague. Except as to that ruling, the district court denied petitioners' motion and *sua sponte* granted summary judgment to the State. The district court entered judgment accordingly on March 12, 1993.

Petitioners' appeal was filed with the court of appeals in July 1993, was opposed by respondents, and oral argument was heard on the appeal in September 1994. In an opinion written by Judge Choy and dissented from by Judge Noonan which was filed on November 18, 1994, the court of appeals affirmed the judgment of the district court. Petitioners' petition for rehearing with suggestion for rehearing *en banc* was denied by the court of appeals on February 23, 1995.

C. The Opinions of the Courts Below

Having interpreted the statute to apply only to commercial speech, the district court went on to hold that the statute met the requirements of the commercial speech test first set out by the Supreme Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). The district court first concluded that the commercial speech at issue was not inherently misleading and therefore was entitled to First Amendment protection. (47a) Then, without the benefit of this Court's later rulings in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Ibanez* v. *Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993); and *Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), the court concluded that the statute directly advanced the state's asserted interests and that the "fit" between those goals and the statute's means was reasonable. (48a-53a)

In the course of its decision, which acknowledged that the State had prohibited even "completely accurate" product representations (51a),[4] the district court rejected a construction

---

[4] The example offered by the court related to the statutory ban on the use of the word "recyclable" unless a product could be "conveniently recycled . . . in every county in California with a population over 300,000 persons." (51a) The statement that "this milk carton is recyclable in San Diego County," the court acknowledged, "might violate the statute even if it is completely accurate." (*Id.*) Although the statutory definition of the word "recyclable" was held unconstitutionally vague, the district court's concession plainly applies to all the other statutorily defined words as well.

of the statute urged by the State which would have limited the statute's application to circumstances in which the regulated words were used in isolation. (51a n.12) According to the State, the statutory definitions have "no application when the words are used in conjunction with modifiers which adequately dispel deception." *See infra*, p. 23 n.13. That statutory construction would have permitted the defined terms to be used in a fashion *inconsistent* with the statutory restrictions so long as "manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms." *Id.* In rejecting the State's proposed construction, the district court did not comment on the fact that the State itself had thus concluded that a far less speech-restrictive statute than that actually adopted by the California Legislature could accomplish all the asserted state interests.

On appeal, the court of appeals, in a two-to-one ruling, affirmed the district court's judgment, adopting much of the reasoning of the district court opinion. Without placing any significant burden on the State to justify the statute, and with scant reference to any record evidence, the majority opinion of the court of appeals held that California's statute directly advances its goals and that there is a reasonable fit between the statute's means and ends. (16a-25a)

Contrary to the requirements of *Edenfield*, *Ibanez* and *Coors*, the court of appeals did not require respondents to prove affirmatively that the statute alleviates a real harm to a material degree under the third prong of the *Central Hudson* test. As regards the requirement of a "reasonable fit" of the statute to the State's goals under the fourth prong of *Central Hudson*, the court of appeals simply ignored the significance of the State's concession in the district court that the statute should not apply at all if the defined terms are used with modifiers that dispel any potential to mislead. The majority opinion of the court of appeals offered no response to Judge Noonan's observation, in dissent, that the State's argument

"does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable." (32a) The majority opinion of the court of appeals also brushed aside other more speech-sensitive alternatives. (23a-24a)

Judge Noonan's dissent concluded that the statute could not be reconciled with the First Amendment. In his view the statute was not only unconstitutionally vague, but an example of viewpoint discrimination which could not "survive the test of rationality, let alone strict scrutiny." (32a)[5] The statute, he concluded, had only "a rough and speculative relation to the interest of the state . . . discriminates among speakers [and] is incompatible with the freedom assured by the First Amendment." (33a)

SUMMARY OF ARGUMENT

What California has essentially done by passing the statute at issue in this case is to write its own ecological dictionary and to require its use by certain—but not all—speakers by the threat of criminal punishment. "[C]ommercial advertisers," as Judge Noonan's dissent emphasizes, are treated "as the untrustworthy," while "nonprofits" to whom the words are

---

[5] As Judge Noonan put it:

> Why have these particular words been made the subject of legislation? Why have Californians Against Waste and the Environmental Defense Fund been allowed to enter the case on the side of the state with the status of intervenors? Why do these intervenors defend the district court's decision with such skill, tenacity and vigor? Plainly because, as the intervenors declare, the words defined are "key environmental terms". In the Green Movement the words are powerful, evocative, almost sacred. There is a sense that they should not be profaned by casual usage. The legislation embodies a clear conviction that there are those who can be trusted to use them and those who cannot be trusted; for the legislation singles out commercial advertisers as the untrustworthy and leaves unregulated and trusted the nonprofits who believe the terms are key.

(31a-32a)

"powerful, evocative, almost sacred" are trusted to use them as they wish. (32a)

The case, as Point I of the petition demonstrates, has been understood from its commencement to raise major issues about the balance that may constitutionally be struck between commercial free speech rights and the public interest in avoiding potentially misleading speech. Other states have awaited the ruling in this case before adopting their own statutes; commentators have noted the impact of the case on "environmental claims all companies make for their products." More broadly, the case raises questions as to the authority of the government to define the very words in which debate about matters of the greatest public moment may proceed. Whether a state may become the official arbiter of the dictionary for society's discussion of any publicly controverted matter is well worthy of this Court's attention.

In that respect, the petition raises two specific issues with respect to the statute. The first, set forth in Point II of the petition, arises out of the utter irrationality of the statute and the fact that there are several far less restrictive alternatives available to accomplish its asserted ends. That the state itself has offered just such an alternative—a reading of the statute that would "tell advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements"—illustrates the reality that the statute cannot begin to be squared with the First Amendment commercial speech jurisprudence of this Court as set forth from the Court's seminal opinion in *Central Hudson* through its most recent ruling in *Coors*.

The second issue, raised by Point III of the petition, is the one-sided nature of the statute which, as Judge Noonan's dissent demonstrates, amounts to nothing less than viewpoint discrimination. By limiting the language that "for-profit" speakers may use about environmental matters at the same time their critics are free to use the language with impunity, the statute falls under this Court's analysis in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS IMPORTANT ISSUES WORTHY OF THIS COURT'S REVIEW CONCERNING FIRST AMENDMENT PROTECTIONS AFFORDED THE TRUTHFUL USE OF COMMON LANGUAGE BY COMMERCIAL SPEAKERS IN THE CONTEXT OF A NATIONAL POLICY DEBATE

This case presents questions as to the extent to which a state may constitutionally regulate and redefine the "commercial" use of key words that are routinely used to describe environmental qualities of products that are sold throughout California and the nation. Both the district court decision and the decision of the court of appeals in this case open with reference to "green marketing" as "the marketing craze of the 1990's," a phrase from the "Green Report" issued by a ten-state task force of state attorneys general in 1990. (6a; 35a)[6] That report and much of the record in this case confirm that manufacturers and distributors of household goods (food, soap, and everything else in the supermarket) and the packaging of those goods (tin cans, glass bottles, paper boxes and plastic containers) are a major, if not dominant, source of information to consumers about the environmental attributes of almost every product that they buy. The parties have never been in dispute that consumers want this information; that they learn about the environmental impact of the goods they buy every day from advertisements and labels; and that it is important that they not be misled about that information. How to strike a constitutional balance between the right of advertisers to speak and the authority of the government to regulate speech that is no more than potentially misleading is what this case is about.

---

[6] The states are California, Florida, Massachusetts, Minnesota, Missouri, New York, Texas, Utah, Washington and Wisconsin.

From the start, the case has been regarded as one of significant national import. Many states around the country have awaited the determination of the fate of California's regulation of environmental language before deciding what steps, if any, they may and should take. Environmental regulatory analysts have noted the paucity of newly introduced state environmental laws that have survived statehouse debate in the years since this action commenced, and have commented that "the main debate" centers on "freedom of commercial speech, and the outcome of the California litigation."[7] The Attorneys General of four states—Minnesota, Tennessee, Massachusetts and Washington—filed a brief amici curiae in support of respondents below, asserting that "[t]he outcome of this litigation is of importance to the states, in view of their obligation to enforce state consumer protection laws against companies engaged in false, deceptive and misleading environmental advertising." (Brief of Amici Curiae, Docket No. 29, at 1)[8]

The case has import beyond its impact on the ongoing debate on environmental policy—beyond, even, its impact on First Amendment law established in cases from *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), to *Rubin* v. *Coors Brewing Co.*, 115 S.

---

[7] State Recycling Laws Update, Year-End Edition 1994, at 29 (Raymond Communications 1994); State Recycling Laws Update, Environmental Labeling Update 1994, at 10 (Raymond Communications 1994).

[8] Other observers, as well, have commented on the significance of both the California statute at issue here and this litigation. One article commenting on this case has concluded that "[i]f environmental marketing dies, California might be the burial site." Steven W. Colford, *Fade Out For Green?*, Advertising Age, Dec. 5, 1994, at 1. Another observed that "[m]anufacturers and advertisers throughout the nation are watching the battle with keen interest," concluding that "[w]hether California's law is ultimately upheld or overturned, it is likely to shape the environmental claims all companies make for their products." John Flinn, *Advertisers Take On Labeling Law; Seeing Red Over "Green,"* San Francisco Examiner, Jan. 3, 1995, at C-1.

Ct. 1585 (1995). The case matters, more broadly, because what the California legislature has done is not only to criminalize truthful and non-misleading speech about environmental qualities of commonly purchased products, but to define the very language in which an ongoing public debate about those matters may proceed. That was the basis for Judge Noonan's dissent, a dissent rooted in his view of the statute as "a zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone, including manufacturers and distributors, is essential to the development of a healthy environment." (28a)[9]

It is undisputed that under the statute manufacturers and distributors of consumer goods may only use the word "recycled" on their products when they contain at least 10% post-consumer material. Their critics, in contrast, may and do use the word as they wish. Thus, on the inside cover of the Green Report—the recommendations of Attorneys General of ten states which is referred to in the first lines of both opinions below (6a; 35a)—the following words appear:

> The cover is printed on 50% recycled paper, 5% of which is post-consumer waste.
>
> The text is printed on 100% recycled paper, 5% of which is post-consumer waste.

(Exhibit 10 to Joint Stipulation of Facts, Docket No. 25) A better example could hardly be offered of the statute's impact: manufacturers and distributors of consumer goods are barred from placing on their products the very phrase "recycled paper, 5% of which is post-consumer waste" that the

---

[9] When Section 17508.5 was proposed for enactment, the California Department of Consumer Affairs voiced similar concerns in opposing its adoption on the ground that "it would be premature to adopt definitions of ecological terms that are still largely undefined and subject to debate." (Appellants' Excerpts of Record submitted to the Ninth Circuit "ER" at 182)

document most relied upon by their critics contains on its cover.

The degree of governmental intrusion into the speech at issue itself warrants plenary review by this Court. When before, for example, has the Court been presented with the equivalent of the Joint Stipulation of Facts here that provided that "[e]xcept where specifically indicated" in the stipulation, the words "ozone friendly," "biodegradable," photodegradable," "recyclable," "recycled" and "consumer good" were *not* used as defined in Section 17508.5? (76a n.*) When before has the Court been presented with a statute that places such draconian limits on the most commonplace use of words that the parties to the litigation have found it literally impossible to use them?

The facts necessary to judicial resolution of this case have been stipulated to by the parties. Both sides have agreed that summary judgment (for one or the other side) is appropriate. It remains only for this Court to determine what the Constitution requires.

II. THE DECISION BELOW HOLDING THAT THE STATUTE IS A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

In the past two years, this Court has rendered four opinions emphasizing the serious "affirmative burden" imposed upon a state under prongs three and four of the four-prong test for regulations on commercial speech first articulated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566 (1980). *See Rubin* v. *Coors* Brewing Co., 115 S. Ct. 1585 (1995); *Ibanez* v. *Florida Dep't of Business and Professional Regulation*, 114 S. Ct. 2084 (1994); *Edenfield* v. *Fane*, 113 S. Ct. 1792 (1993); and *Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).[10]

[10] On May 1, 1995, this Court granted certiorari in *44 Liquormart Inc.* v. *Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 63 U.S.L.W.

At a time when this Court has made increasingly clear the significant evidentiary showing required of states in order to justify their restrictions on commercial speech, and the searching analysis required of courts in evaluating the state's evidence, the Ninth Circuit has completely disregarded the dictates of this Court, deferring to the legislature as if rational basis review in this area had not been explicitly rejected by the Court in *Cincinnati*, 113 S. Ct. 1510 n.13, and failing even to cite or acknowledge in its *Central Hudson* analysis recent decisions of this Court (*i.e.*, *Cincinnati*, *Edenfield* and *Ibanez*) that were discussed at length in the parties' briefs. This Court's most recent opinion in *Coors* itself confirms that the opinion below—and the statute at issue here—cannot withstand First Amendment scrutiny.

Under *Central Hudson*, in analyzing a statute's effect on (1) truthful and non-misleading commercial speech, the statute cannot survive review unless the state can establish (2) a substantial government interest, (3) that such interest is directly advanced by the statute's restriction, and (4) that the statute is no more extensive than necessary to serve that interest. 447 U.S. at 566. Both the Ninth Circuit and the district court acknowledged that the words at issue here are not "inherently misleading" and are thus entitled to First Amendment protection.[11] *See Peel* v. *Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 109 (1990); *Shapero* v.

3786 (U.S. May 1, 1995) (No. 94-1140). That case raises the question of whether a Rhode Island statute restricting liquor price advertising can be squared with this Court's commercial speech jurisprudence.

[11] Petitioners have in the past recognized, and do so now, that the terms regulated by Section 17508.5 could be used in ways that are confusing or misleading to some consumers. That, in fact, is why some of petitioners' members have themselves sought legislative or administrative relief to seek to ensure that consumers are fully informed. None of petitioners' members, however, have advocated guidelines which require that the public be told *less* than an advertiser can support or that sweep in and prohibit a broad range of highly specific messages that are neither false nor misleading. Section 17508.5, however, does just that.

Kentucky Bar Ass'n, 486 U.S. 466, 479 (1988). The parties agree that the state's interests in consumer protection and environmental conservation are substantial. The heart of this case—and the stark conflict between the opinion below and this Court's most recent cases—lies in prongs three and four of the *Central Hudson* test.

A. California's Restriction on the Use of Environmental Language by Commercial Speakers, as Written and as Construed by the Courts Below, Is Irrational and Does Not Directly Advance California's Interests to a Material Degree

If one principle stands out above all others as regards the third prong of the *Central Hudson* test, it is that when the "irrationality" of a "unique and puzzling regulatory framework ensures that [a] labeling ban will fail to achieve" its asserted end, *Coors*, 115 S. Ct. at 1593, it cannot pass First Amendment muster. Here, as in *Coors*, that is precisely what the regulatory framework ensures.

For example, in assessing Del Monte's "Precious Metal" advertisement (annexed at the end of this petition, 98a), which lauds the environmental attributes of the very "tin cans" in which Del Monte's products are packaged, the district court held, and the Ninth Circuit agreed, that educational or "informational advertisements that contain *generalized* expressions of an environmental attribute are not within the statute's ambit." (9a-10a; 39a-40a & n.6) (emphasis supplied) This reading of the statute was offered in a candid effort of the courts below to avoid any reading of the statute which could encompass non-commercial speech and thus "hoist the level of scrutiny" (40a) or "trigger strict scrutiny." (9a)[12] To this end, the courts below held that Section 17508.5 permits manufacturers and distributors to use the regulated terms to

---

[12] No party or court reviewing this case has even suggested that Section 17508.5 can meet the strict scrutiny test.

say whatever they wish so long as their statements are phrased "generally" enough.

The result is utterly irrational. Del Monte may publish an advertisement with its name and logo prominently displayed on it which touts the very cans in which its products are sold because advertisements which laud the benefits of tin cans "*in general*" are not covered by the statute. (9a; 40a) (emphasis supplied) But Del Monte, so it seems, could run afoul of the statute if it asserts in so many words that consumers should purchase its peaches *because* they are packaged in "the world's most perfect container," a tin can that can be "recycled". To which the inevitable next question is: What can possibly be said to be accomplished by such a statute? Obviously, whatever risk supposedly posed to consumers or the environment by these advertisements is the same. It was just this sort of irrationality that led this Court in *Coors* to strike down a statute that prohibited statements of alcohol content on beer containers but not in beer advertisements. *Coors*, 115 S. Ct. at 1592.

The majority opinion of the Ninth Circuit further demonstrated the statute's irrationality (and thus its failure to directly advance the State's asserted interests) when it stated that speakers silenced by the statute may simply use "alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up under Section 17508.5 (*e.g.*, 'this product contains x% [*reused/recaptured*] materials,' in lieu of 'recycled'; 'these trash bags will decompose in two years under x conditions,' in lieu of 'biodegradable')." (25a) (citations omitted) According to the Ninth Circuit, then, the ability of commercial speakers to use "other" words, *e.g.*, "reused" instead of "recycled," should assuage their First Amendment concerns. But by permitting words to be used which are surely no more inherently clear than the restricted terms, California has surely solved nothing—not its supposed consumer deception problem and not any environmental problem. Here, as in *Coors*—

where numerical disclosures of alcohol content on beer labels were prohibited in the service of combatting "strength wars" but descriptive terms suggesting high alcohol levels were permitted, 115 S. Ct. at 1592-93—there is no basis for concluding that the statute can truly advance any articulated State goal.

The burden of the state *affirmatively* to demonstrate the direct advancement of its goal has repeatedly been emphasized by this Court: "mere speculation or conjecture" or conclusory statements of government officials will not do. *Edenfield*, 113 S. Ct. at 1800. "[R]ather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* *Accord Cincinnati*, 113 S. Ct. at 1514-16.

Again, in *Ibanez*, this Court emphasized that the state must affirmatively justify its restrictions with real and specific—as opposed to merely speculative or conjectural—evidence. *Ibanez*, 114 S. Ct. at 2089. This burden must rest with the state, the Court explained, because "the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.' " *Id.* (citations omitted). Most recently, this Court emphasized in *Coors* that the requirement that the government justify its statute with real evidence "was critical." 115 S. Ct. at 1592.

Here, California has failed to come close to doing so. In the proceedings below, the State argued, and the Ninth Circuit agreed, that the statute directly advances both a consumer protection goal and an environmental goal. As to the first, as pointed out by Judge Noonan in his dissenting opinion below, the entire factual basis for the district court's conclusion that the regulated words are potentially misleading—the supposed real harm—is "only one instance of one word, cited by a partisan of the statute and unproved in court." (30a) As Judge

Noonan observed, "[t]he true basis for this far-reaching conclusion, on which the [Ninth Circuit's] majority opinion so heavily relies, is speculation." (31a) "Speculation is no basis on which to support a criminal law licensing speech." (*Id.*, *citing Edenfield*, 113 S. Ct. at 1800). *See Coors*, 115 S. Ct. at 1592; *Ibanez*, 114 S. Ct. at 2089.

Just as the harms recited by the State are merely speculative, so too is the State's purported showing that Section 17508.5 " 'will in fact alleviate [those harms] to a material degree,' " as it must in order to pass constitutional muster. *Coors*, 115 S. Ct. at 1592; *Edenfield*, 113 S. Ct. at 1800. Without citation to anything in the record, the Ninth Circuit held that the statute "increases consumer knowledge and awareness and discourages exploitation and deception." (18a) But the entire record makes clear that the opposite is true. The State has not demonstrated that consumers will know that the defined terms carry their statutory meaning. In addition, Judge Noonan's dissenting opinion pointed to a level of vagueness of the State's definitions—particularly in their use of "natural" as an objective standard "in an environment and economy where there is scarcely any '*nature*' independent of human intervention"—which itself illustrates the failure of the State affirmatively to demonstrate that the statute would accomplish any of its asserted goals. (28a-29a) (emphasis supplied)

In holding that the statute directly advanced the State's goals, the Ninth Circuit acknowledged that "comprehensive economic data are lacking" (17a), but, following the district court, placed great emphasis on the "nexus between commercial representations and consumption." (18a) But that is not the relevant inquiry under *Coors*, *Ibanez* and *Edenfield*. Here, the State did not and could not show that barring use of the regulated terms in truthful, non-conforming messages actually helps consumers make more informed choices or encourages environmentally responsible conduct because the real result is that consumers, who learn about products'

"alleged ecological attributes from packaging labels" (17a), are in fact deprived of truthful and accurate information about those attributes. "Any 'interest' in restricting the flow of accurate information because of the perceived danger of that knowledge is anathema to the First Amendment; more speech and a better-informed citizenry are among the central goals of the Free Speech Clause. Accordingly, the Constitution is most skeptical of supposed state interests that seek to keep people in the dark for what the government believes to be their own good." *Coors*, 115 S. Ct. at 1597 (Stevens, J., concurring) (citing *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-70 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 374-75 (1977)).

B. The Existence of Several Less Restrictive Alternatives to California's Statute Establishes That There Is No Reasonable Fit Between the Statute's Means and Its Asserted Ends

In *Cincinnati* this Court emphasized that in order to establish the "reasonable fit" required by *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989), between a statute's regulatory means and its asserted ends so as to satisfy the fourth prong of the *Central Hudson* test, the state must "affirmatively" demonstrate through record evidence that the statute is "narrowly tailored" and its costs "carefully calculated." *Cincinnati*, 113 S. Ct. at 1510 & n.12 (citation omitted). Regulations which disregard far less restrictive and more precise means of achieving the government's asserted objectives are not narrowly tailored. *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 n.13.

In analyzing the statute to see whether there exists a "reasonable fit" between its regulatory means and ends, the Ninth Circuit majority overlooked entirely the significance of the State's concession at the district court level that the statute should be read to apply *only* to situations in which the terms were used in isolation; the statute, the State then

argued, had *no* application where the words were used in conjunction with modifiers which adequately dispel deception.[13] In other words, a far less restrictive rule than Section 17508.5 would have served all of the interests claimed by the State to justify the statute.

Judge Noonan noted in his dissent that "the abandoned argument does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable." (32a) Indeed, that the State failed to consider the scope and impact of Section 17508.5's application before this litigation "indicates that [the State] has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its" statute. *Cincinnati*, 113 S. Ct. at 1510. The import of this is clear: where, as here, there is an obviously less-burdensome alternative to the restriction on commercial speech, the "fit" between ends and means is not reasonable. *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 n.13.

---

[13] The State's brief read as follows:

> [The State] respectfully suggests the correct way to interpret Section 17508.5 is as follows: the legislature only meant to define the words of the section when they are used in isolation, because then, without an agreed upon definition, they carry a great potential to be misleading; further the definition has no application when the words are used in conjunction with modifiers which adequately dispel deception.
>
> * * * *
>
> [I]f manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms, then Section 17508.5 has no application.
>
> * * * *
>
> [M]anufacturers and distributors are free to advertise the claimed environmental attributes of their products so long as they fully explain what the words they use mean in relation to the claim for that product.
>
> * * * *
>
> [Section 17508.5] tells advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements.

(92a-97a)

The State's proposed judicial/legislative solution is not the only example of a means brushed aside by the Ninth Circuit that is both more fitting to the State's goals and more sensitive to First Amendment concerns. The Ninth Circuit failed even to address that other states and the federal government have, without constitutional difficulty, flexibly balanced the interest in protecting consumers against the interest in the free flow of commercial ideas. Recent Federal Trade Commission guidelines permit qualifying language in order to explain the context in which particular environmental terms are used. FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (1994).[14] In addition, as Judge Noonan pointed out, Maine has enacted legislation expressly adopting the FTC guidelines approach in its entirety. Me. Rev. Stat. Ann. tit. 38, § 2142 (West Supp. 1994).

Beyond that, precisely the same sort of legislative solution is available here that the Court referred to in *Coors*: legislation directly requiring more environmentally sound packaging would obviate the need for a statute limiting speech;[15] so would continued enforcement of Sections 17500 and 17508 of the California Business and Professions Code—which predated Section 17508.5 and which prohibit false or misleading advertising and marketing claims generally. (*See* 67a-69a, 85a-86a) The case-by-case review afforded by those laws promotes full and accurate disclosure and is particularly suited to the regulation of ecological terms which are the "subject of debate" and ongoing "[t]echnological changes." (Statement of

---

[14] Adherence to the FTC guidelines is no defense under the California statute.

[15] *Coors*, 115 S. Ct. at 1593-94. The court of appeals' quotation with approval of the district court's conclusion that "the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech" (25a) cannot be squared with *Coors*. Moreover, as *Coors* and all the recent cases ignored by the court of appeals demonstrate, it is hardly "second guessing" for a court to assure that First Amendment standards have been met.

the California Department of Consumer Affairs, ER 182) (*See* 28a) (Noonan, J., dissenting)

III. CALIFORNIA'S ONE-SIDED STATUTORY RESTRICTION ON THE USE OF CRITICAL ENVIRONMENTAL LANGUAGE BY "FOR PROFIT" SPEAKERS IMPERMISSIBLY DISCRIMINATES ON THE BASIS OF VIEWPOINT CONTRARY TO THIS COURT'S TEACHINGS IN *R.A.V.* v. *CITY OF ST. PAUL*

In *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992), this Court held that even those regulations that are limited in their reach to cover only traditionally "unprotected" or lesser protected categories of speech must undergo a heightened strict scrutiny analysis when they discriminate on the basis of viewpoint. This Court held facially invalid in that case an ordinance prohibiting bias-motivated disorderly conduct because it imposed special prohibitions on those speakers who expressed disfavored views on the subjects of "race, color, creed, religion or gender." *Id.* The Court reasoned that even traditionally unprotected "fighting words" could not be selectively silenced on the basis of the underlying message expressed. The Court made clear that the same strict scrutiny analysis would also apply to other categories of speech which customarily receive lesser protection, expressly including commercial speech regulations, that go beyond mere content regulation to actual viewpoint discrimination. *Id.* at 2546.

This case raises the question of whether California, in its effort to regulate environmental advertising, has transgressed those boundaries. Judge Noonan so concluded, on the ground that Section 17508.5's regulation of only the "for profit" speakers constitutes a form of viewpoint discrimination destined "to be held a violation of the First Amendment unless, strictly scrutinized, it is shown to be narrowly tailored to serve a compelling state interest." (32a) (*citing R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538, 2547 (1992)) The majority opinion offered no response.

The effect of the statute is not in dispute. Manufacturers and distributors may not urge upon prospective consumers that their products are biodegradable within two years, however truthful that statement may be. The very word "biodegradable" is stripped from their vocabulary unless they use it as the California legislature has decreed. But, as Judge Noonan pointed out, Californians Against Waste and others in the Green Movement are free to use the term as they like in the course of seeking to persuade the public that only products that are biodegradable within one year are worthy of their environmental accolades. (*See* 32a)

So it is with all the words. Critics of manufacturers or distributors of goods may, as we pointed out earlier, freely describe their own offerings as having been printed on "recycled paper, 5% of which is post-consumer waste"; manufacturers or distributors risk criminal penalties if they do so. As Judge Noonan observed, "[s]uch a distinction between speakers, made by a legislature, has a name: viewpoint discrimination." (32a) *See MD II Entertainment, Inc.* v. *City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (citing *R.A.V.*, recognizing applicability of strict scrutiny to viewpoint discriminatory regulations of commercial speech); *Citizens United for Free Speech II* v. *Long Beach Township Board of Commissioners*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) (following *R.A.V.*, applying heightened level of review to content-based regulation of commercial speech); *cf. Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. at 1520-21 (Blackmun, J., concurring).

Instead of reaching all speakers in California, Section 17508.5 effectively restricts only manufacturers and distributors from using those " 'key environmental terms' " which, "[i]n the Green Movement . . . are powerful, evocative, almost sacred." (32a) (Noonan, J., dissenting) But California "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of

Queensbury Rules." *R.A.V.*, 112 S. Ct. at 2548. *See also Boos* v. *Barry*, 485 U.S. 312 (1988).

The fact that manufacturers' use of the regulated terms occurs in a commercial context provides no basis for upholding restrictions on such use so long as the information conveyed is truthful and not misleading. *Coors*, 115 S. Ct. at 1595 (Stevens, J., concurring). "A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies. When the speakers use the same language, it's not difference enough that one speaks for profit and the other for 'nature.' " (32a) (Noonan, J., dissenting) The statute, however, undeniably favors non-commercial speakers over commercial speakers, self-styled environmental watchdogs over distributors of products, the Green Movement over those it disdains. Whether the First Amendment permits such disparate treatment is well worthy of this Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 24, 1995

Respectfully submitted,

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

Of Counsel:

Susan Buckley
Katherine B. Harrison
Jonathan Donnellan
Cahill Gordon & Reindel
(a partnership including a
professional corporation)

TABLE OF CONTENTS

APPENDIX

	PAGE
Association of National Advertisers, Inc. et al. v. *Lungren*, 44 F.3d 726 (9th Cir. 1994)	1a
Association of National Advertisers, Inc. et al. v. *Lungren*, 809 F. Supp 747 (N.D. Cal. 1992)	34a
Association of National Advertisers, Inc. et al. v. *Lungren*, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (9th Cir. Feb. 23, 1995)	62a
U.S. Constitution Amendment I	64a
U.S. Constitution Amendment XIV, Section 1	64a
28 U.S.C. § 2201 (1988 & Supp. V 1993)	64a
28 U.S.C. § 2202 (1988)	65a
42 U.S.C. § 1983 (1988)	65a
California Business and Professions Code	65a
§ 17508.5 (West Supp. 1995)	65a
§ 17500 (West 1987)	67a
§ 17508 (West Supp. 1995)	67a
Plaintiffs' and Defendant's Joint Stipulation of Facts, July 23, 1992	70a
Excerpted pages 33, 43-44 and 47 from Memorandum of Points and Authorities of Defendant Daniel Lungren, Attorney General of the State of California, in Opposition to Plaintiffs' Motion for Summary Judgment, August 21, 1995	92a
Examples of Advertisements and Labels No Longer Seen in California or Changed Because of the California Statute	98a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATION OF NATIONAL ADVERTISERS, INC.; GROCERY MANUFACTURERS OF AMERICA, INC.; SOAP AND DETERGENT ASSOCIATION; NATIONAL FOOD PROCESSORS ASSOCIATION; THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; THE AMERICAN PAPER AND FOREST ASSOCIATION; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs-Appellants,

CALIFORNIANS AGAINST WASTE and THE ENVIRONMENTAL DEFENSE FUND,

Intervenors-Appellees,

v.

DANIEL E. LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant-Appellee.

No. 93-15644

D.C. No. CV-92-00660-MHP

OPINION

Appeal from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted
September 13, 1994—San Francisco, California

Filed November 18, 1994

Before: Herbert Y.C. Choy, John T. Noonan, Jr., Circuit Judges and Alfredo C. Marquez, District Judge.*

Opinion by Judge Choy;
Dissent by Judge Noonan

SUMMARY

Business Law/Consumers/Advertising

The court of appeals affirmed a district court judgment. The court held that a California statute that regulates environmental claims that can be made by manufacturers and distributors of consumer goods, is not an unconstitutional restriction on speech.

California Business and Professions Code § 17508.5 makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are "ozone friendly," "biodegradable," "photodegradable," "recyclable" or "recycled," unless their goods meet the statute's definitions of those terms. Appellants, the Association of National Advertisers, Inc. and other plaintiffs (collectively, Trade Associations) responded to the passage of § 17508.5 by bringing suit in the district court against appellee the Attorney General of California. The Trade Associations sought a declaration that § 17508.5 impermissibly restricts both commercial and non-commercial speech and is unconstitutionally vague. They

*The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

also pursued a permanent injunction against the statute's enforcement. Appellees, the Californians Against Waste and the Environmental Defense Fund (collectively, CAW) intervened.

The district court held that the statute was adequately tailored to further substantial state interests in consumer and environmental protection and, accordingly, complied with the First Amendment. The Trade Associations appealed, contending that the district court erred in concluding that § 17508.5 regulates only commercial speech. The Trade Associations also contended that the district court erroneously analyzed the statute under an intermediate standard of scrutiny inapplicable to non-commercial speech, or to commercial speech inextricably intertwined with more privileged expression. The Trade Associations also contended that the district court misapplied intermediate scrutiny by ignoring far less restrictive alternatives to § 17508.5 and mistakenly finding that the statute directly advances a substantial governmental interest.

[1] The district court correctly found that the messages § 17508.5 regulates possess the characteristics the Supreme Court recognizes as constituting commercial speech. [2] Accordingly, the district court correctly settled on intermediate scrutiny, the "more relaxed inquiry" applicable to restrictions on commercial speech. [3] The Trade Associations failed to raise any compelling actual or hypothetical examples of non-commercial representations that, in offending the statute, would compel a finding of its unconstitutionality or at least trigger strict scrutiny. As the district court observed, the statute only applies to representations that a "specific consumer good" possesses a "particular environmental attribute." [4] In addition, the district court correctly determined that § 17508.5 escapes strict scrutiny because it does not embrace non-commercial messages inextricably linked with commercial speech. [5] The district court established the basis for intermediate scrutiny by determining correctly that § 17508.5

is directed only at commercial speech and does not collaterally stifle more privileged speech.

[6] Given the nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation. [7] Section 17508.5 increases certainty in the market both on the demand and the supply side. [8] In setting rather modest minimum targets for the recycled content and decomposition periods of consumer products, the statute creates an incentive for manufacturers of noncomplying products to enhance the environmental attributes of their goods in order to capture the benefits of green labelling. This incentive directly furthers California's substantial interest in promoting resource conservation and reducing the burden on its brimming landfills.

[9] The Trade Associations incorrectly contended that § 17508.5 was unconstitutional under the "far-less-restrictive means test." [10] Alternative statutes are *less* precise and potentially more inhibiting of truthful environmental representations. [11] Other potential alternatives were not clearly less burdensome than adherence to uniform definitions.

[12] Thus, the district court correctly determined that intermediate scrutiny governed § 17508.5, and its conclusion that the statute passed muster under intermediate scrutiny was affirmed.

Judge Noonan dissented, writing that the statute violates First Amendment free speech guarantees. He found the language unconstitutionally vague and potentially misleading. The statute, he wrote, is vague in the standard set, has a rough and speculative relation to the interests of the state, and discriminates among speakers.

COUNSEL

Floyd Abrams, Cahill, Gordon and Reindell, New York, New York, for the plaintiffs-appellants.

Albert N. Sheldon, Deputy Attorney General, San Diego, California, for the defendant-appellee.

Barbara Olshasky, Environmental Defense Fund, New York, New York, for the intervenors-appellees.**

Maria Savasta Kennedy, Rosen, Bien, & Asaro, San Francisco, California, for the intervenors-appellees.

OPINION

CHOY, Circuit Judge:

Appellants, the Association of National Advertisers, Inc., *et al.* (Trade Associations), appeal the district court's grant of summary judgment upholding the constitutionality of California Business and Professions Code § 17508.5. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

**Briefs of *amici curiae* urging reversal were filed in support of the plaintiffs-appellants by the Washington Legal Foundation and by the Media Institute in conjunction with Capital Cities/ABC, Inc., Dow Jones & Company, Inc., Fox, Inc., the National Association of Broadcasters and Providence Journal Company.

Briefs of *amici curiae* urging affirmance were filed in support of the defendant-appellee by the California Resource Recovery Association, Washington Citizens for Recycling, the National Resources Defense Council, Solana Recyclers, San Diego Recycling Company, Weisco Recycling, Envirothene Plastics, Inc., Talco Plastics, Wellman Inc., and Enviroplastics; the Center for Science in the Public Interest and Public Voice for Food and Health Policy; and the States of Minnesota, Tennessee, Connecticut, Massachusetts, Texas and Washington.

I. FACTUAL AND PROCEDURAL BACKGROUND

Section 17508.5 makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are "ozone friendly", "biodegradable", "photodegradable", "recyclable" or "recycled" unless their goods meet the statute's definitions of those terms. *See* Appendix. In 1990, the California Legislature enacted this statute in the wake of a report on environmental advertising issued by a ten-state task force of state attorneys general (the Task Force). This report summarized the findings of the Task Force from a public meeting it convened in March 1990 to address the potential for abuse raised by the increasing popularity of what the attorneys general characterized as "[g]reen marketing . . . the marketing craze of the 1990's."

The Task Force found disparities in the usage of these terms by different firms and noted the assertions of environmental groups and business representatives that there was "growing confusion surrounding many environmental marketing claims" creating a "fertile ground for abusive business practices." *Ass'n of Nat'l Advertisers, Inc. v. Lungren*, 809 F. Supp. 747, 750 (N.D. Cal. 1992). The Task Force further discerned a "wide degree of consensus among business and environmental groups" on the need for "development of national standards, guidelines or definitions to guide business in making environmental claims and to help consumers understand the claims made." Section 17508.5 is an attempt to implement these findings at the state level.

In February 1992, the Trade Associations responded to the passage of section 17508.5 by bringing suit in the Northern District of California against the attorney general of California, Appellee Daniel Lungren (Lungren or California). The Trade Associations sought a declaration that section 17508.5 impermissibly restricts both commercial and non-commercial speech and is unconstitutionally vague. They also pursued a permanent injunction against the statute's enforcement.

Appellees, the Californians Against Waste and the Environmental Defense Fund (collectively referred to as "CAW"), intervened.

The district court held that the statute was adequately tailored to further substantial state interests in consumer and environmental protection and, accordingly, complied with the First Amendment. The Trade Associations appeal this ruling here on the basis that (1) the district court erred in concluding that section 17508.5 regulates only commercial speech; (2) the district court erroneously analyzed the statute under an intermediate standard of scrutiny inapplicable to non-commercial speech, or to commercial speech inextricably intertwined with more privileged expression; and (3) the district court misapplied intermediate scrutiny by ignoring far less restrictive alternatives to section 17508.5 and mistakenly finding that the statute directly advances a substantial governmental interest.[1]

II. DISCUSSION

A. *Intermediate scrutiny governs section 17508.5.*

The Trade Associations contend that the district court erred in holding that section 17508.5 regulates only commercial speech. They further assert that as a result the district court applied to the statute an unduly deferential standard of review, the intermediate scrutiny governing commercial speech. We disagree.

A district court's interpretation of a statute presents a question of law reviewed de novo. *United States v. Freeman*, 6 F.3d 586, 592 (9th Cir. 1993).

---

[1]In addition, the district court accepted the Trade Associations' contention that the statute's definition of "recyclable" was unconstitutionally vague, but otherwise rejected their challenge of section 17508.5 for vagueness. This ruling has not been appealed.

[1] We agree with the district court that "the messages regulated by section 17508.5 possess the three characteristics recognized by the Court as constitutive of commercial speech" in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). *Lungren*, 809 F. Supp. at 754. In *Bolger*, the Court struck down a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives under the First Amendment. In doing so, the Court set out three characteristics which, in combination, supported its conclusion that the informational pamphlets at issue constituted commercial speech, including (i) their advertising format, (ii) their reference to a specific product, and (iii) the underlying economic motive of the speaker. *Bolger*, 463 U.S. at 67.

Here, the district court reasonably found all three of these factors present. Judge Patel observed:

> First, by its explicit terms, the statute regulates representations concerning a specific consumer good which take the form of advertisements or product labels. Second, section 17508.5 specifically requires that the representation be made about a specific consumer good which a firm manufactures or distributes. Third, there is little doubt that by touting the environmental benefits of consumer products, plaintiffs' association members hope to capture a portion of the "green market".

Lungren, 809 F. Supp. at 754.

[2] Accordingly, the district court correctly settled on the "more relaxed inquiry" applicable to restrictions on commercial speech. *Id.* at 751, *citing Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Under this intermediate scrutiny, the asserted governmental interest must be "substantial", rather than "compelling", and the regulation adopted must "directly advance" this interest, rather than be "precisely drawn". *See Central Hudson Gas v. Pub. Serv.*

Comm'n of N.Y., 447 U.S. 557, 566 (1980); *Consolidated Edison*, 447 U.S. 530, 540 (1980).

We are not persuaded that the district court "basically redrafted the statutory language" in order to avoid strict scrutiny. In the Trade Associations' view, section 17508.5 applies on its face to any " 'representation' about certain environmental characteristics of consumer goods made by any 'person' who manufactures or distributes those goods." In support of this interpretation, the Trade Associations first point to the statute's supposed title, "environmental representations relating to consumer goods." Insofar as this "title" was added by the editors of West's Publishing Co., it affords scant insight into the statute's intended ambit.

The Trade Associations also object that, in the absence of exemptions for statements "designed to inform and persuade the public", a manufacturer or distributor could conceivably fall afoul of section 17508.5 by using a non-conforming definition of one of the statutorily defined terms to make a political, editorial or otherwise non-commercial representation. This possibility, they contend, exposes them to the hazards of "content or viewpoint censorship," chills privileged speech and renders the statute unconstitutional.

[3] However, the Trade Associations fail to raise any compelling actual or hypothetical examples of non-commercial representations that, in offending the statute, would compel a finding of its unconstitutionality or at least trigger strict scrutiny. As the district court observed:

> [S]ince the statute only applies to representations that a specific consumer good possesses a particular environmental attribute, plaintiffs' examples are all unavailing. Educational advertisements which laud the benefits of tin cans in general are not representations concerning the environmental attributes of a particular consumer good, and therefore do not

> offend the statute. Similarly, informational advertisements that contain generalized expressions of an environmental attribute are not within the statute's ambit. Finally, a firm's statement that it supports recycling is certainly not a representation concerning a consumer good.

Lungren, 809 F. Supp. at 752.

We bear in mind that "[a] statute, of course, is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 (1981). The district court's interpretation is more than "fairly possible". As the district court observed, the preamble specifies that only representations pertaining to the speaker's own products give rise to potential liability. In addition, the district court reasonably attributed some significance to the California legislature's placement of section 17508.5 in the middle of Part 3, Chapter 1 of the code, entitled "Advertising", and, more specifically, in Article 1 of Chapter 1, entitled "False Advertising in General". In conjunction with the three *Bolger* factors analyzed by the district court and the limiting language in the statute's preface, the placement of section 17508.5 amidst provisions more generally governing advertising and, in particular, false advertising, betokens the statute's commercial subject matter and the California legislature's intent to regulate misrepresentations made in a commercial context exclusively.

We are also not persuaded that the Court "expressly rejected" the district court's interpretation of *Bolger's* guidance as to the commercial/non-commercial dichotomy in *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993), an opinion handed down in the interim between Judge Patel's decision and this appeal. In *Cincinnati*, the Court struck down a municipal ban on newsracks containing "commercial handbills" which exempted newsracks contain-

ing "newspapers" with non-commercial elements. The Court held that there was not a reasonable fit between the content-based ban and the city's legitimate interest in safety and esthetics, insofar as "respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain of Cincinnati's sidewalks." *Id.* at 1514.

While *Cincinnati* devotes considerable attention to the uncertain contours of commercial speech and its least privileged "core", 113 S. Ct. at 1511-1513, it does not abolish the commercial/non-commercial speech distinction or the three-part test enunciated in *Bolger* and applied by the district court. *See Outdoor Systems, Inc. v. City of Mesa*, 997 F.3d 604, 610 (9th Cir. 1993) (concluding in light of *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993) that the "commercial-noncommercial analytical distinction still exists"). Rather than adapt or abandon the distinction between commercial and non-commercial speech, the Court in *Cincinnati* merely reiterated that allegedly core commercial speech must be " 'examined . . . carefully to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed.' " 113 S. Ct. at 1513, *quoting Bolger*, 463 U.S. at 66.

The district court followed this guidance in its examination of section 17805.5. It diligently parsed the statutory definitions and analyzed numerous examples of speech allegedly in danger of being chilled by the statute. *Lungren*, 809 F. Supp. at 754, 760-62. With the exception of the term "recyclable", deemed unduly vague, the district court satisfied itself after thorough analysis that section 17508.5 would neither stifle non-commercial expression by manufacturers and distributors nor create unconstitutionally excessive uncertainty for such merchants in their use of the regulated terms in commercial speech.

[4] In addition, the district court correctly determined that section 17508.5 escapes strict scrutiny because it does not

embrace non-commercial messages inextricably linked with commercial speech. Where commercial and non-commercial speech are inseparable, strict scrutiny is required. *Fox*, 492 U.S. at 477. Applying the *Fox* test for severability of commercial and non-commercial speech, the district court reasonably concluded that editorializing was not essential to product advertising. *Lungren*, 809 F. Supp. at 753 ("[w]hile statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about the environment"). Conversely, the district court persuasively reasoned that a firm can editorialize about the environment, lambast the statute or laud recycling without advertising or otherwise making commercial representations about one of its products. *Id.* at 754. Insofar as these activities are severable and separately treated under section 17508.5, the district court appropriately selected intermediate scrutiny.

The Trade Associations also argue that restrictions on commercial speech only become subject to intermediate scrutiny where the governmental interest they further relates directly to the distinction between commercial and non-commercial speech. Here, they contend, the "District Court has run afoul of the very holding of *Cincinnati* that commercial speech may *not* be treated differently from non-commercial speech when the distinction between the two bears no relationship to the interests that the State has asserted."

Cincinnati, involving municipal beautification efforts, is readily distinguishable from the instant case, involving protection of consumers against potentially misleading commercial speech. Citing *Bolger*, 463 U.S. at 81, the Court in *Cincinnati* marked the boundaries of its "narrow" ruling by noting that:

> Cincinnati has not asserted an interest in preventing commercial harms by regulating the information dis-

> tributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.

Cincinnati, 113 S. Ct. at 1515. The Court emphasized that, insofar as the attractiveness of a newsrack was unrelated to its contents, the city's restriction based on commercial content "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 1514. Here, as explained further below, California *has* asserted an interest in preventing commercial harms, and the distinction between commercial and non-commercial speech is directly related to that interest. As the district court concluded, merchants' commercial representations about the environmental attributes of their wares are far more likely to mislead consumers than their editorial commentary opposing the statute or encouraging recycling and use of biodegradable materials.

[5] In sum, we conclude that the district court established the basis for intermediate scrutiny by determining correctly that section 17508.5 is directed only at commercial speech and does not collaterally stifle more privileged speech.

B. *Section 17508.5 withstands intermediate scrutiny.*

The Trade Associations assert that section 17508.5 fails to withstand intermediate scrutiny, even assuming its applicability, because the statute prohibits truthful and accurate commercial speech, fails to advance directly any alleged government interest, and is more restrictive than necessary to serve its supposed interests. We disagree.

The constitutionality of a statute is a question of law reviewed de novo. *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 962 (9th Cir. 1986).

1. *Section 17508.3 restricts potentially misleading speech.*

Central Hudson enunciated a four-part test for gauging the constitutionality of a statute subject to intermediate scrutiny. The first part of the *Central Hudson* test requires a determination of whether the speech in question "is protected by the First Amendment. For commercial speech to come within that provision, it must at least concern lawful activity and not be misleading." 447 U.S. at 566. Establishing a benchmark for the application of this factor, the Court in *Central Hudson* postulated that "[t]he government may ban commercial messages which are more likely to deceive the public than to inform it. *Id.* at 563.

The district court held that "the environmental advertisements in question are at least potentially misleading to the public and therefore some form of regulation is justified." *Lungren*, 809 F. Supp. at 756. In doing so, it rejected the CAW's position that the commercial speech at issue "is inherently misleading and therefore not protected by the First Amendment at all." *Id.* at 755, n.7.

This ruling was correct. The following four factors govern whether commercial speech enjoys the protection of the First Amendment: (i) whether the speech restricted is devoid of "intrinsic meaning"; *Friedman v. Rogers*, 440 U.S. 1, 12 (1978) (ii) the "possibilities for deception", *id.* at 13; (iii) whether "experience has proved that in fact such advertising is subject to abuse," *In re R.M.J.*, 455 U.S. 191, 203 (1982); (iv) the ability of the intended audience to evaluate the claims made." *Id.*

Whether the terms regulated by section 17508.5 are misleading or informative as used in representations about consumer products depends in large part on the proximity of recycling facilities, the composting techniques of local landfills, and other circumstantial factors objectively ascertainable, with some difficulty, by the consumer. In locales where

consumers have access to facilities and technologies favoring recycling and speedy decomposition, the terms subject to section 17508.5 may accurately inform the consumer that the product is environmentally sound in some measure. In the less favorable circumstances prevailing in many areas of California, use of the same terms could well be misleading. Depending on these contingencies, use of the regulated terms may or may not be deceptive, and is accordingly only "potentially misleading".

Contrary to the CAW's assertions, *Friedman* does not undermine this conclusion. In *Friedman*, the Court upheld a complete ban on optometrists' use of trade names in practising their profession as furthering a substantial state interest in preventing deception of consumers. The Court underscored that "[h]ere, we are concerned with a form of commercial speech that has no intrinsic meaning" and only "ill-defined associations . . . with price and quality." *Friedman*, 440 U.S. at 12-13. In contrast, the terms regulated by section 17508.5 may be imprecise, but they are not altogether fanciful or inherently uninformative. "Recycled", for example, conveys at least a modicum of information informing the consumer that the product consists in some measure of reused resources, even if the source of recapture may be uncertain. In contrast, the trade names at issue in *Friedman* consisted largely of more fleeting or at least subjective associations rather than anything resembling "intrinsic" meaning for purposes of the first factor of the test enunciated in that case for determining whether commercial speech merits First Amendment protection.

As discussed more fully below, we find further support for affording limited protection to the speech regulated by section 17508.5 in the remaining three factors governing this inquiry, focusing on its potential for deception in light of the lessons of experience and the nature of the target audience. Accordingly, we deem the statute to comport with the first part of the *Central Hudson* test.

2. *California's interests in environmental and consumer protection are undisputed.*

The parties agreed that California had a substantial governmental interest in ensuring truthful environmental advertising and encouraging recycling. Therefore, the district court properly concluded that "[t]he second part of the *Central Hudson* inquiry requires no discussion." *Lungren*, 809 F. Supp. at 756.

3. *Section 17508.5 directly advances undisputed governmental interests.*

As to the third part of the *Central Hudson* test, the district court correctly noted that the fit between the governmental interest and the legislative means chosen to promote it "need not be perfect, but simply reasonable." *Id.* at 757, *citing Metromedia, Inc. v. San Diego*, 453 U.S. 490, 509 (1981) (plurality). Put somewhat differently, the First Amendment and the third prong of *Central Hudson* require only that, in the commercial context, the speech-restrictive means chosen provide more than "ineffective or remote support" for a legitimate governmental policy goal. *Central Hudson*, 447 U.S. at 564.

Applying this test, the district court found that section 17508.5 "directly advances the asserted governmental interest." *Lungren*, 809 F. Supp. at 757. In reaching this conclusion, the district court deemed reasonable "the California legislature's belief that uniform standards for frequently used environmental advertising terms would promote the state's consumer protection goals." *Id.*

To establish the requisite nexus between the governmental interest asserted and the measure adopted, California need not resort to a chain of complex, untested and tenuous assumptions about "conditional and remote eventualities". *See Central Hudson*, 447 U.S. at 569 (deeming asserted governmental interest in equitable distribution of the costs of sub-optimal

electricity consumption too tenuous to support regulation prohibiting utility company from inserting handbills promoting off-peak consumption in billing statements). California seeks to guard against a direct, predictable and ongoing result of green marketing—increased sales of goods as a result of potentially specious claims or ecological puffery about products with minimal environmental attributes. This supposition is sufficiently reasonable and substantiated to support the district court's finding of an adequate fit under the third prong of the *Central Hudson* test. As the district court noted:

> In holding that Puerto Rico's ban on advertising casino gambling directly advanced the government's interest in reducing the demand for gambling, the *Posadas* Court looked no further than the reasonableness of the legislature's belief that advertising casino gambling increases the demand for gambling.

Lungren, 809 F. Supp. at 757, *citing Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986).

[6] Here, as in *Posadas*, the nexus between advertising, consumer demand and the asserted governmental interests is sufficiently close. Although comprehensive economic data are lacking, the record contains abundant support for the proposition that green marketing boosts consumer demand for the allegedly recycled or biodegradable product. *See Lungren*, 809 F. Supp. at 755. Appellees and amici have cited numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5. *See* Stephen Gardner, *How Green Were My Values: Regulation of Environmental Marketing Claims*, 23 Univ. Toledo L. Rev. 31 (1991). Finally, the record indicated that most consumers who purchase environmentally-oriented products discovered their alleged ecological attributes from packaging labels. In short, we find sound support for the California legislature's conclusion that ecological claims boost consumer demand for products that do not always measure

up. Given this nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation.[2]

a. *The consumer protection interest.*

[7] Section 17508.5 increases certainty in the market both on the demand and the supply side. The statute increases consumer knowledge and awareness and discourages exploitation and deception of the growing green market identified by the Task Force. Section 17508.5 prevents the unscrupulous advertiser from capturing the green premium that ecologically-minded consumers are increasingly willing to pay for goods whose environmental bona fides they are ill-equipped to assess. To be sure, the statute does not require labels sufficiently specific to distinguish the most ecologically sound products from those whose "green" pedigree is less pure but statutorily adequate. Nevertheless, the ten-percent threshold for "recycled" content claims and one-year maximum period for "biodegradable" and "photodegradable" claims, for example, at least permit the ecologically-minded consumer to steer clear of products whose environmental attributes are *de minimis*. The statute thus sets forth "objective and consistently applied standards" of the sort whose existence has led the Court to overturn categorical bans on speech in order to prevent deception of the public. *See, e.g., Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 109 (1990) (striking down regulation prohibiting references even to legitimate certification credentials on attorney's letterhead).

---

[2]In its analysis of *Central Hudson*'s third prong, the district court only analyzed the fit between section 17508.5 and California's interest in ensuring truthful environmental packaging and advertising. However, California's interest in recycling—discussed by the district court in its analysis of the now essentially similar fourth prong— was likewise undisputed and further supports the district court's ruling under the third prong.

More generally, these provisions give all consumers information permitting them to make rational product comparisons and tradeoffs in price versus "greenness". While less ecologically-oriented consumers may continue to choose brands not qualifying for eco-labelling under section 17508.5, this choice will at least become a more deliberate and informed one based on more accurate and transparent claims. Accordingly, section 17508.5 increases the flow and purity of information in the marketplace. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 ("[t]he First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely").

In addition, the statute acts as a surrogate for monitoring functions which consumers cannot easily or comprehensively perform. In serving this function, section 17508.5 is not infused with the sort of paternalism decried by the Trade Associations and by the Court in *Peel*, 496 U.S. at 105 (rejecting the "paternalistic assumption that the recipients of petitioner's letterhead are no more discriminating than the audience for children's television"). Whether a consumer protection measure is unduly paternalistic cannot be gauged without consideration of the cogency and character of the regulated class, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465-66 (1978), *Peel*, 496 U.S. at 109, the transparency of the claims, their volume and the attendant burden on consumers of monitoring them, *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 477 (1988), and the capacities and resources of the target audience to discriminate between truthful and specious claims. *See Peel*, 496 U.S. at 108; *American Home Products, Corp. v. F.T.C.*, 695 F.2d 681, 698 (3rd Cir. 1982) (taking into account "difficulty for the average consumer to evaluate . . . claims through personal experience").

One is confronted at every turn with evidence of the persuasive power and pervasive role of consumer product advertising in our daily commerce. For the individual consumer,

the purchase of a consumer good, in contrast to the choice of a lawyer at issue in *Peel*, is a routine event. As such, monitoring far more frequently encountered labelling and advertising claims about such products is proportionally far more onerous. In addition, while the majority in *Peel* rejected Justice O'Connor's dissenting view that "the public will believe that all certifications are state sanctioned," *Peel*, 496 U.S. at 105, n.13, here such a belief may more readily be presumed given the broad and widely publicized role of government in regulating the written content of food labels and other consumer product packaging. *See, e.g.*, Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990).[3]

On the supply side, section 17508.5 is also favorable to scrupulous firms and merchants. In particular, the statute benefits firms whose products are not 100% environmentally friendly but nevertheless meet the minimum thresholds. It does so by delineating with bright lines a potential safe harbor in which such firms might truthfully represent their products to be "recycled" or "biodegradable" while establishing a good faith defense against prosecution under more general statutes aimed at preventing consumer fraud, including the prohibitions on false advertising set forth in sections 17500 and 17508 of the California Business and Professional Code. In turn, section 17508.5 may again create benefits for consumers in the form of reduced prices reflecting the lower insurance

---

[3]As *amici* Center for Science in the Public Interest and Public Voice for Food and Health Policy point out, regulations on deceptive advertising and labelling of foods and drugs have repeatedly been upheld against First Amendment challenges. *See, e.g., Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 324-26 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1284 (1993) (upholding Federal Trade Commission (FTC) ban on deceptive claims about the calcium content of processed cheese products); *Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554, 562 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) (upholding FTC prohibitions on certain types of advertising claims about analgesics); *United States v. General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D.N.Y. 1986) (upholding Food and Drug Administration's prohibition on certain types of nutritional claims on product labels).

premiums and legal costs that manufacturers are likely to enjoy in the more certain regulatory environment fostered by the statute. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 594 (1991) (upholding forum selection clause in cruise line's form ticket in part because passengers who purchase such tickets "benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued").

In addition, the statute shields ecologically-oriented firms from unfair price competition. Rivals will no longer be able to negate such firms' green marketing edge by representing as "recycled" products consisting of dross recaptured from the factory floor rather than— in keeping with the more common understanding of the term— a significant (i.e., ten percent or more) portion of costlier reprocessed post-consumer waste. Section 17508.5 thus directly discourages free riding by environmentally-disinclined firms on ecological gains funded by consumers in the form of higher prices paid for "green" goods, and by other firms in the form of higher production costs unlikely to be recouped in a market of unregulated claims by lower-cost competitors.

b. *The environmental protection interest.*

[8] In setting rather modest minimum targets for the recycled content and decomposition periods of consumer products, the statute creates an incentive for manufacturers of noncomplying products to enhance the environmental attributes of their goods in order to capture the benefits of green labelling. This incentive directly furthers California's substantial interest in promoting resource conservation and reducing the burden on its brimming landfills. If producers of ecologically substandard products achieve the statute's minimum thresholds, these improvements translate directly into less waste being dumped and dumped waste decomposing more rapidly. If such producers fail to adapt, a considerable number of ecologically-oriented consumers may reasonably be

expected to shift in substantial measure to the products of complying firms and thereby effect the same result, additional landfill capacity and resource conservation, provided consumers can distinguish relatively green products, as section 17508.5 permits. Accordingly, section 17508.5 accords with the third prong of the *Central Hudson* test.

4. *No far less restrictive alternatives to section 17508.5 exist.*

Literally read, the fourth prong of the *Central Hudson* test requires that a restriction on commercial speech be "no more extensive than necessary to further the state's interest." 447 U.S. at 569-70. However, as noted by the district court, the Court recently explained that this test, contrary to its literal formulation, " 'requires something short of a least-restrictive-means standard.' " *Lungren*, 809 F. Supp. at 757, *quoting Fox*, 492 U.S. at 477.

In *Fox* the Court ruled that the Second Circuit erred in requiring the district court to apply a least-restrictive-means test to a state university's regulation banning private commercial enterprises from its facilities. While the Court in *Fox* instructed that a narrowly tailored regulation on less privileged commercial speech would logically pass muster, it also indicated that an even more flexible standard governs such "hardy, less likely to be chilled" expression. *Fox*, 492 U.S. at 481. The Court observed that "almost all of the restrictions disallowed under *Central Hudson*'s fourth prong have been substantially excessive, disregarding 'far less restrictive and more precise means.' " *Id.* at 479, *quoting Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988). This interpretation, coupled with the Court's unwillingness to designate "narrow tailoring" as more than an upper bound for the test governing commercial speech, suggests that the First Amendment and *Central Hudson*'s fourth prong permit a more deferential "far-less-restrictive means test" for commercial speech.

[9] The Trade Associations do not dispute this interpretation of *Fox*. However, applying this "far-less-restrictive means test", they contend that section 17508.5 is unconstitutional because the statute's alleged "blunderbuss approach sweeps so far beyond what could possibly be deemed false and deceptive that it cannot possibly provide a reasonable fit with the State's interests." We disagree.

The Trade Associations offer two purportedly far less restrictive alternatives: case-by-case prosecution of spurious environmental claims under existing false advertising statutes or adoption of a statute or regulations mandating qualifying or explanatory language to clarify use of the regulated terms not conforming with section 17508.5. The possibility of a case-by-case approach under existing statutes governing false advertising, previously opposed but newly advocated by the Trade Associations, does not undermine section 17508.5 under the fourth prong as explicated in *Fox*. The district court rejected this alternative on the basis that "nothing prevents a legislative body from adopting a specific law simply because a more general law already exists." *Lungren*, 809 F. Supp. at 758-59.

[10] More tellingly, *Fox* does not permit a restriction according with *Central Hudson*'s first three prongs to be struck down in the absence of a "far less restrictive and *more precise* means." *Fox*, 492 U.S. at 479, *quoting Shapero*, 486 U.S. at 476 (emphasis added). The prohibitions of false advertising in sections 17500 and 17508 of the Business and Professional Code require reference to vague, unspecified standards (e.g., "untrue and misleading", Section 17500; "false or misleading", Section 17508) as opposed to section 17508.5's numerically exact thresholds, to ascertain liability. These alternative statutes are *less* precise and, as the district court noted, potentially more inhibiting of truthful environmental representations. *Lungren*, 809 F. Supp. at 759. Moreover, these statutes promote a narrower range of state interests than section 17508.5, insofar as they fail to create the same

incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities. Accordingly, *Central Hudson* and *Fox* do not dictate that the California legislature repeal section 17508.5 in favor of the pre-1990 statutory status quo.

The second suggested alternative, a statute requiring "more speech", runs headlong into the Court's rejection of such an approach to fourth prong analysis in *Fox*. 462 U.S. at 479. As Justice Scalia observed for the majority in *Fox*,

> In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it.'

Id., *quoting Posadas*, 478 U.S. at 344 (emphasis in original).

[11] Here, as discussed above, the linkage between the asserted governmental interest and advertising was equally close, and the restriction less sweeping than that sustained by the Court in *Posadas*. Here, an alternative approach requiring additional speech to illuminate environmental claims was equally close at hand. Yet as the district court observed, these and other potential alternatives—including prescreening, format and content guidelines and added detail—were not clearly less burdensome than adherence to uniform definitions. *Lungren*, 809 F. Supp. at 759. In addition, as we concluded with regard to Cal. Bus. & Prof. C. §§ 17500 and 17508, it is not apparent that use of the regulated terms with qualifiers would advance California's second asserted interest, environmental protection.

More importantly, the district court need not make finely calibrated determinations of this sort where the alternatives are closely balanced. *Fox* and *Posadas* support the district court's conclusion that in the commercial context, "the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech." *Id.* (citation omitted).

To be sure, there is inevitably a degree of arbitrariness in the legislative determination of where along the continuum of recycled content percentages or decomposition timetables a product becomes "recycled" or "biodegradable". But *Fox* and *Posadas* leave scant judicial latitude to disturb such legislative determinations where, as here, the thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial commentary and, in the commercial context, alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up under section 17508.5 (e.g., "this product contains x% [*reused/recaptured*] materials," in lieu of "recycled"; "these trash bags will decompose in two years under x conditions," in lieu of "biodegradable"). *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (intermediate scrutiny requires that restrictions on speech " 'leave open ample alternative channels for communication of the information' ") (citation omitted). Accordingly, we affirm the district court's ruling that "the California legislature has stayed within constitutional parameters in restricting commercial expression," *Lungren*, 809 F. Supp. at 759.

III. CONCLUSION

[12] The district court correctly determined that intermediate scrutiny governs section 17508.5. Its conclusion that the statute passes muster under intermediate scrutiny is **AFFIRMED.**

APPENDIX

§ 17508.5. It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of the ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14909.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

NOONAN, Circuit Judge, dissenting:

I accept the majority's conclusion that the speech made criminal by this statute is commercial speech. I follow the doctrine of the Supreme Court that commercial speech is, ordinarily, more subject to state regulation than noncommercial speech. I have no doubt at all that untrue or deceptive advertising can be outlawed. I see no problem in the government prescribing precise labels for what cures our bodies or goes into them, or goes into a gas tank. But I have great difficulty in seeing this statute as anything other than a zealous and unconstitutional intrusion by a state government into an area where technologies are developing, the free play of ideas is important, and the free speech of everyone, including manufacturers and distributors, is essential to the development of a healthy environment. Tested by our Bill of Rights, the statute is defective.

To begin with, several of the definitions imposed on manufacturers and distributors under criminal penalties are unconstitutionally vague. Three definitions have a common deficiency: the use of nature as an intelligible standard in an environment and economy where there is scarcely any "nature" independent of human intervention. "Ozone-friendly" and "any like term" (a bit of extra vagueness) are defined as a chemical or material that "will not migrate to the stratosphere and cause unnatural and accelerated deterioration of the ozone." California Bus. and Prof. Code § 17508.5(a). What is unnatural deterioration of the ozone? How is unnaturalness to be determined? What state of the universe is assumed to be the natural state as far as ozone is concerned? The statute affords no guidance. It compels the advertiser to determine at the peril of criminal penalties that the product advertised does not have this elusive metaphysical quality.

Less obviously, because "natural" may seem less problematic than "unnatural," but just as effectively, the statutory definitions of biodegradable and photodegradable are vague in

their use of nature as the standard for the products advertised. To be biodegradable under the criminal law of California the product must be decomposable through "natural processes." What is a "natural process"? Is it one in which there is no human intervention? Is the implicit assumption of the statute that nature is one thing and human activity another, so that if human intelligence intervenes the process is no longer natural? The same questions are latent in the definition of photodegradable in terms of ability to decompose by "physical processes, such as exposure to heat and light," where "physical" is a stand-in for "natural." The advertiser is left to speculate what degree of human intervention will sully the natural and so lead to noncompliance with the statutory command.

As for "recyclable" and "recycled", what is recyclable should eventually be recycled. One would expect the definition of the two terms to be in tandem. The statute, however, adopts one definition of "recyclable" and another of "recycled", so that what is "recyclable" will not necessarily be "recycled" when re-use is made. "Recyclable" has now been held to be defined in a fashion incomprehensible to a manufacturer or distributor of ordinary intelligence. Does striking it from the statute make "recycled" more intelligible by removing the statute's inconsistency? Arguably, yes, although a lingering doubt remains about the surviving definition which in its origin was so flawed.

There is an additional flaw. "Recycled" is not completely defined by the statute at issue but by cross-reference to the Public Contract Code § 12200(b). The difficulty with this definition is as follows: For the regulation of commercial speech to be sustainable under the First Amendment there must be at least a reasonable fit between the statute and the state's goal. *United States v. Edge Broadcasting Co.*, 61 U.S.L.W. 4759, 4762 (1993). The Public Contract Code's definition of "postconsumer waste" takes no account of the differences among the principal materials subject to recycling — glass,

metal, paper, and plastic — nor the different technologies by which recycling of these materials may be accomplished. As the Environmental Protection Agency has observed: "it is not clear that a commonly accepted, sound basis exists setting content percentages across many products." EPA, *Request for Comments; Guidance for Use of the Term 'Recycled' and 'Recyclable' and the Recycling Emblem in Environmental Marketing Claims*, 56 Fed. Reg. 49,992, 49,996 (1991). In the statutory definition of recycled, the vagueness inheres not in the definition but in the fit between the definition and the state's interest. At best it is a speculation that there is any connection between protection of the environment, encouragement of environmentally sensitive advertisers, and protection of environmentally conscious consumers and the blunderbuss definition of "postconsumer waste" which serves as a crude guide in public purchasing.

The statute has other constitutional infirmities. The district court noted that to avoid the reach of the First Amendment the words that the statute defined must be "sufficiently deceptive." As to whether the words were in fact "sufficiently deceptive," the district court candidly acknowledged that it found "no easy answer." The strongest thing the district court could say about the restricted words was that, without the state's help, they were "potentially misleading." To substantiate that characterization the district court cited a letter from the attorney general's office to the governor which "opined" that there had been "an increase" in "questionable 'environmental' advertising." No actual instances of deception were cited; the letter was written as advocacy for enactment of the statute. The district court also cited a letter from the sponsor of the legislation to the governor. This letter did indeed give two examples, one involving the use of "biodegradable," the other of "recyclable." The second example, however, led nowhere, because the district court removed "recyclable" from the statute; so that only one instance of one word, cited by a partisan of the statute and unproved in court, is the factual basis for the conclusion that all four words are potentially

misleading. The true basis for this far-reaching conclusion, on which the majority opinion so heavily relies, is speculation. Speculation is no basis on which to support a criminal law licensing speech. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993).

Even if, contrary to the record in this case, the presumption were indulged that a factual predicate of potential deceptiveness had been established, such facts would not justify the state's invasion of freedom of speech. A variety of words are commonly used in American advertising, all of which are potentially misleading. For example:

antique
bargain
economical
environmentally sound
naturally good

A paternalistic government might decide to protect consumers by criminalizing all advertising containing these words if the product advertised failed to conform with the state's own definition. That the terms defined were capable of misleading use would be incontestable. That a criminal law of this character would violate the First Amendment would be equally incontestable. Potential misuse "does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information." *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91, 109 (1990). The difference between this hypothetical statute and the California criminal law at issue here is not a difference in kind or in degree. The only difference is that the California law has chosen a different set of speculatively misleading words to define and criminalize.

Why have these particular words been made the subject of legislation? Why have Californians Against Waste and the Environmental Defense Fund been allowed to enter the case

on the side of the state with the status of intervenors? Why do these intervenors defend the district court's decision with such skill, tenacity and vigor? Plainly because, as the intervenors declare, the words defined are "key environmental terms". In the Green Movement the words are powerful, evocative, almost sacred. There is a sense that they should not be profaned by casual usage. The legislation embodies a clear conviction that there are those who can be trusted to use them and those who cannot be trusted; for the legislation singles out commercial advertisers as the untrustworthy and leaves unregulated and trusted the nonprofits who believe the terms are key.

Such a distinction between speakers, made by a legislature, has a name: viewpoint discrimination. Such a distinction has a constitutional destiny, to be held a violation of the First Amendment unless, strictly scrutinized, it is shown to be narrowly tailored to serve a compelling state interest. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2438, 2547 (1992). A legislature cannot privilege one set of speakers as the good guys, while restraining another set of speakers as the baddies. When the speakers use the same language, it's not difference enough that one speaks for profit and the other for "nature."

This broad-brush, speculatively-justified statute cannot survive the test of rationality, let alone strict scrutiny. To the state's present embarrassment, the state argued in its Points and Authorities to the district court that the plaintiffs would not violate the statute if their advertising qualified the restricted terms appropriately. This argument, of course, rewrote the statute, was ignored by the district court, and is abandoned by the state on this appeal. But the abandoned argument does point to the obvious, that with a minimum of effort the legislature could have provided that qualified use of the terms was acceptable. The legislature tacitly conceded as much by accepting in the statute itself any definitions "established in trade rules adopted by the Federal Trade Commission." If potential misuse was the problem, it would

have been possible to do as the FTC may sometime do and as Maine in fact does do, provide a governmental definition of "recycled content," but permit any "properly qualified statement of fact" addressed to consumers. Maine Rev. Stat. Ann., Title 38, § 2141.2. When such means could be used to attain the legislative end, the present fit is too rough to be rational.

In summary, the statute in question, criminalizing the use of specific words in commercial speech, is vague in the standard set; has a rough and speculative relation to the interests of the state; and discriminates among speakers. The statute is incompatible with the freedom assured by the First Amendment.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. C-92-0660 MHP

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and CHAMBER OF COMMERCE OF THE UNITED STATES

Plaintiffs,

—vs.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California

Defendant.

OPINION

Plaintiffs The Association of National Advertisers, *et al.*, bring this action against defendant Daniel Lungren, in his official capacity as Attorney General of the State of California.[1] Plaintiffs challenge section 17508.5 of the California Business and Professions Code, which regulates certain environmental claims used in advertising, on the grounds that: (1) the statute violates plaintiffs' First Amendment rights, and

---

[1] Pursuant to rule 24(a) of the Federal Rules of Civil Procedure, this court previously granted defendant-intervenor status to Californians Against Waste and the Environmental Defense Fund.

(2) it is unconstitutionally vague. The matter is presently before the court on plaintiffs' motion for summary judgment. After carefully considering the submissions and arguments of the parties and the amici,[2] the court enters the following Order and Opinion.

I. BACKGROUND

In March 1990 a ten state task force of Attorneys General conducted public hearings to discuss the problems generated by the use of potentially misleading environmental advertising claims. Based on the testimony and written submissions of representatives from industry, consumer and environmental groups, the task force found:

> "Green marketing" has become the marketing craze of the 1990's. The American public is increasingly concerned about environmental issues, and people are looking for ways to do their part to protect and restore our nation's resources. As consumers have become more aware of the environmental impacts of the products they purchase, environmental awareness has begun to influence purchasing decisions.
>
> The increasing interest in the environmental consequences of purchasing decisions has not been lost on the business community. . . . Many companies have begun claiming that their products provide some benefit to the environment. . . . This marketing strategy, which has become known as "green marketing," can be informative to conscientious consumers when it is used honestly. Unfortunately, attempts to take advantage of consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.

---

[2] The Media Institute filed a brief of amicus curiae in support of plaintiffs and the States of Minnesota, Tennessee, Massachusetts and Washington (collectively) submitted a brief of amicus curiae in support of the State of California.

Joint Stipulation ("JS"), Ex. 10 at 1. Specifically, the task force noted that, in response to the growing consumer desire to purchase "environmentally safe" products, businesses advertised hundreds of products as "degradable," "recyclable," "recycled," and "ozone friendly." *Id.* at 5.[3]

California has also experienced an increase in the amount of environmental product advertising in the years prior to the enactment of section 17508.5. JS ¶ 49. Moreover, the terms employed in these advertisements are used differently by advertisers when claims are made about a product's environmental attributes. JS ¶ 23. In other words, not all firms mean the same thing when they label their products "ozone friendly," "recyclable," or the like. As the Attorneys General explained:

> Both environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive advertising practices. . . . [T]he words commonly used in environmental marketing, such as "environmentally friendly," "degradable," "recyclable," and "ozone friendly" have no clear, uniform meaning. Different manufacturers use the terms to promote different environmental benefits.

JS, Ex. 10 at 13.[4]

---

[3] According to the task force, products making environmental claims constituted over 9 percent of all new products introduced in the United States in the first half of 1990, a twenty-fold increase since 1985. JS, Ex. 10 at 5 n.3.

[4] As a result of their findings, the task force recommended that uniform definitions be established to govern environmental marketing claims. After issuing its report, the Attorneys General held a second set of hearings to obtain comments on their findings and recommendations. Plaintiff The American Paper Institute, Inc. ("API") concurred with the task force's recommendation, testifying that they too saw the need for definitions to provide meaning to environmental marketing claims: "API believes that some form of standardized definitions and guidelines should be developed to provide meaning to environmental terms used in product advertising and labeling." JS, Ex. 9 at 1.

It was in this climate that the California legislature in September 1990 passed AB 3994, the Environmental Advertising Claims Act which, *inter alia*, added section 17508.5 to the California Business and Professions Code ("section 17508.5"). The statute, entitled "Environmental Representations Relating to Consumer Goods," provides that:

> It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission.

Cal. Bus. & Prof. Code § 17508.5.[5]

The sole issue before this court is whether the California legislature, in its effort to regulate the "green marketing" phenomenon, has run afoul of the Constitution.

II. LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (the nonmoving party may not rely on the pleadings but must present significant prorative evidence supporting the claim). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Moreover, the inferences to be drawn

---

[5] The entire text of section 17508.5 is set forth in the Appendix to this opinion.

from the facts must be viewed in a light most favorable to the party opposing the motion. *T.W. Elec. Serv.*, 809 F.2d at 631.

If the court is satisfied that no genuine issue of material fact exists, and that absent any such issue judgment may be entered as a matter of law, the court may *sua sponte* grant summary judgment to the nonmoving party. *Cool Fuel, Inc. v. Connett*, 605 F.2d 309, 311 (9th Cir. 1982); *see also Celotex*, 477 U.S. at 326 ("district courts are widely acknowledged to possess the power to enter summary judgment *sua sponte* . . . .").

III. DISCUSSION

A. *The First Amendment*

1. *What is the Character of the Speech at Issue?*

Initially the court must examine the character of the speech regulated by section 17508.5 in order to apply the appropriate standard for reviewing the statute. To the extent that the statute restricts noncommercial messages, it is subject to strict scrutiny and "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Pub. Serv. Com.*, 447 U.S. 530, 540 (1980) (citations omitted). Regulations affecting commercial speech, however, invite a more relaxed inquiry. *See Bd. of Trustees of State* Univ. of N.Y. v. Fox, 109 S.Ct. 3028, 3033 (1989) ("Our jurisprudence has emphasized that commercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.").

Plaintiffs contend that section 17508.5 sanctions *any use* of the regulated terms, thereby restricting their noncommercial expression. On this reading of the statute, plaintiffs complain that they are unable to express their policy views or publish editorial or informational advertisements aimed at inducing public activism.

The plain meaning of section 17508.5, however, supports no such interpretation. The first sentence of section 17508.5 clearly establishes that the law applies only to manufacturers and distributors of consumer goods who make certain representations about their products: "It is unlawful for any person *to represent* that any consumer good *which it manufactures or distributes* is . . . ." Cal. Bus. & Prof. Code § 17508.5 (emphasis added). Any uncertainty as to the statute's reach is mitigated by subsection (g) which provides that "a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation." *Id.* § 17508.5(g). Finally, that the statute only pertains to product advertising is gleaned from the fact that the legislature placed section 17508.5 in Part 3, Chapter 1, Article 1 of the Business and Professions Code, which is entitled "False Advertising in General."

In an effort to paint section 17508.5 as a law that restricts noncommercial speech, plaintiffs offer numerous examples of the types of political messages which are allegedly stifled.[6]

---

[6] Such examples include the following:

Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

Imagine this. A child is running down the dock at a marina to join his father for a summer sail in the family boat. Suddenly, his foot slips out of its sandal, and his bare foot scrapes across the wide planks. There are no screams of pain, no frenzied dash for the first-aid kit. Because in addition to being impervious to water, insects and weather, the dock is splinterless. It's not made of wood, it's made from recycled plastics.

In another part of the country, a young couple moves into their first home. Workmen have just installed the new wall-to-wall carpet, which has rich, vibrant colors and soft, plush pile. The new high-quality carpet is made from recycled plastics.

(*footnote continued*)

However, since the statute only applies to representations that a specific consumer good possesses a particular environmental attribute, plaintiffs' examples are all unavailing. Educational advertisements which laud the benefits of tin cans in general are not representations concerning the environmental attributes of a particular consumer good, and therefore do not offend the statute. Similarly, informational advertisements that contain generalized expressions of an environmental attribute are not within the statute's ambit. Finally, a firm's statement that it supports recycling is certainly not a representation concerning a consumer good.

In a further attempt to hoist the level of scrutiny, plaintiffs argue that their commercial advertisements are inseparable from their policy oriented speech designed to educate consumers on current environmental issues. This argument relies on *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) which held that when commercial speech is "inextricably intertwined" with fully protected speech, courts must apply the test for noncommercial speech. *Id.* at 796. *Riley* involved a state law which mandated that professional fundraisers disclose to potential donors the percentage of contributions that are actually turned over to the charitable organization. In rejecting the state's contention that deferential commercial speech scrutiny should apply because the mandatory disclosure law only governed commercial transactions, the Court explained that "[o]ur lodestars in deciding what level of scrutiny to apply to a *compelled statement* must be the nature of the speech taken as a whole and the effect of the *compelled statement* thereon. *Id.* (emphasis added). For this reason, the Court subjected the law to exacting First Amendment scrutiny.

On a snowy mountain, a skier emerges from the base lodge, wrapped snugly in a warm parka and bib-front pants. The insulating fiberfill in these outer garments is made of recycled plastics.

Sounds like science fiction? Or an optimistic projection for the year 2010? It's not. These are simply individual examples selected from the myriad of consumer and commercial products that are already being made from recycled plastics.

The Court's reasoning in *Riley* has no purchase on the instant case for the simple reason that section 17508.5 does not compel speech; it merely sets forth statutory definitions for common environmental advertising terms. Moreover, the Supreme Court has explicitly rejected a similar attempt to extend the reach of Riley's holding. In *Fox* the Court reviewed whether a University Resolution which prohibited "tupperware parties" in student dormitories violated the First Amendment. The plaintiff argued that because their demonstrations also touched on subjects such as financial responsibility and how to run an efficient home, pure speech and commercial speech were "inextricably intertwined" and the entirety should be treated as noncommercial speech. The Court, per Justice Scalia, disagreed:

> *Riley* involved . . . compelled commercial speech . . . . There, of course, the commercial speech (if it was that) *was* "inextricably intertwined" because the state law *required* it to be included. By contrast, there is nothing whatever "inextricable" about the noncommercial aspects of these presentations. No law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares. Nothing in the Resolution prevents the speaker from conveying, or the audience from hearing, these noncommercial messages, and nothing in the nature of things requires them to be combined with commercial messages.

Fox, 109 S.Ct. at 3031-32 (emphasis in original).

Like the Resolution upheld in *Fox*, section 17508.5 does not require that plaintiffs combine commercial and noncommercial speech in their advertisements. The noncommercial elements contained in plaintiffs' editorial and informational advertisements are not absolutely necessary to sell the product at issue. While statements that a firm supports recycling, for instance, are undoubtedly included in advertisements as a marketing tool and may in fact augment sales, firms can nevertheless sell their wares without editorializing about

the environment. Thus, since the advertising contemplated by section 17508.5 unquestionably proposes a commercial transaction, and since the commercial and noncommercial messages are not "inextricably linked" under *Fox*, section 17508.5 applies only to commercial speech.

The court's holding in this regard is supported by the great weight of decisional law. In *Central Hudson Gas v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), the Court applied commercial speech principles in reviewing a Public Utility Commission's order banning all advertising that promoted the use of electricity. Concurring with the Court's result but not its reasoning, Justice Stevens argued that because the promotional advertising in question included claims "relating to . . . questions frequently discussed and debated by our political leaders," it should be afforded full First Amendment protection. *Id.* at 581 (Stevens, J., concurring). The majority disagreed, noting that under Justice Steven's approach, any advertisement which linked a product to a current public debate would perforce be entitled to broad constitutional protection:

> But many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety . . . . [U]tilities enjoy the full panoply of First Amendment protections for their direct comments on public issues. There is no reason for providing similar constitutional protection when such statements are made only in the context of commercial transactions.

Id. at 562 n.5.

The Court affirmed this logic in *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983) by deciding that advertisements for contraceptives constituted commercial speech, "notwithstanding the fact that they contain discussions of important public issues such as the prevention of venereal disease and family planning." *Id.* at 67-68. The *Bolger* court explained that like the Public Utility in *Central Hudson*, contraceptive manufacturers enjoy the full panoply of First Amendment protection whenever they express themselves

directly on contemporary public issues. Furthermore, "[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues." *Id.* at 68; *see also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985) (attorney's advertisement containing statements regarding the legal rights of persons injured by the Dalkon Shield treated as commercial speech.)

In the case at bar plaintiffs also attempt to immunize their commercial speech from state regulation by insisting that editorial or informational statements concerning current environmental policy transform their advertisements into speech deserving greater constitutional protection. The Supreme Court's reasoning in *Central Hudson* and *Bolger* counsels to the contrary. Like the regulations at issue in those cases, section 17508.5 places no general restrictions on plaintiffs' right to comment directly on current environmental policy. Plaintiffs are free to encourage recycling, or to editorialize about the environmental benefits of biodegradable plastics, or to comment on the desirability of ozone friendly products. The statute under review does not restrict the types of expression normally afforded "the full panoply" of constitutional protection.

Finally, the messages regulated by section 17508.5 possess the three characteristics recognized by the Court as constitutive of commercial speech. In Bolger the Court classified the informational advertisements under review as commercial speech because: (1) they were in the form of an advertisement, (2) they referred to a specific product, and (3) there was an economic motive behind the speech. 463 U.S. at 66-67. Though alone, none of these factors might be sufficient to turn the materials into commercial speech, the "combination of all these characteristics [compels] the conclusion that the informational pamphlets are properly characterized as commercial speech." *Id.* at 67.

First, by its explicit terms, the statute regulates representations concerning a specific consumer good which take the form of advertisements or product labels. Second, section 17508.5 specifically requires that the representation be made

about a specific consumer good which a firm manufactures or distributes. Third, there is little doubt that by touting the environmental benefits of consumer products, plaintiffs' association members hope to capture a portion of the "green market." As plaintiffs concede, California consumers "buy products based on their asserted environmental attributes." JS ¶ 48. Despite the fact that educating consumers about the environmental attributes of consumer products may well enhance environmental quality, *see e.g.*, JS ¶ 17, the primary motivation of such advertising is economic, namely, to sell products.

Although drawing the line between "purely commercial ventures and protected distribution of written materials [is] a difficult task," *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 630 (1980), First Amendment jurisprudence recognizes "the common-sense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). For the reasons set forth above, the court concludes that the regulated speech in this case is entitled to the qualified protection accorded commercial speech.

2. *Is Section 17508.5 a Permissible Restriction on Commercial Speech?*

Having determined that section 17508.05 regulates commercial speech, the court must now determine whether the statute passes muster under the more relaxed commercial speech standards. In *Central Hudson* the Court outlined a four part inquiry for analyzing the lawfulness of restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must

> determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

As for the first step of the *Central Hudson* analysis, the Court has explained that whatever concern the First Amendment has for protecting commercial speech is rooted in the informational function of advertising. Therefore, the Constitution does not prevent prohibitions on commercial messages which are "more likely to deceive the public than to inform it." *Id.* at 563 (citation omitted). *But see Peel v. Attorney Reg. & Disciplinary Com'n*, 110 S.Ct. 2281, 2292 (1990) (categorical ban on factually accurate commercial speech that may be potentially misleading to some consumers is constitutionally infirm). Whether the terms defined in section 17508.5—ozone friendly, biodegradable, photodegradable, recyclable, and recycled—are sufficiently deceptive to place the statute beyond the reach of any First Amendment protection is a question to which, frankly, this court finds no easy answer.[7]

Arguably, there is ample evidence that advertisements which extol a product's environmental benefits are potentially deceptive. In urging California Governor Deukmejian to sign AB 3994, the Attorney General's office opined:

> In recent years we have been an increase in questionable "environmental" advertising with claims such as "environmentally friendly," "biodegradable," and "recyclable" being utilized with virtually no scientific support. . . . Environmental claims are similar to the "health" claims made for elixirs in the Old West. There was no scientific

---

[7] Even the parties defending the constitutionality of section 17508.5 do not agree on this issue. For the purposes of the first part of the *Central Hudson* inquiry, defendants assume that the terms defined in section 17508.5 are not misleading and urge the court to focus its inquiry on the last three prongs of the *Central Hudson* test. *See* Def. Opp. at 42. Defendant-Intervenors, on the other hand, posit that the commercial speech in question is inherently misleading and is therefore not protected by the First Amendment at all. *See* Def. Int. Opp. at 26-29.

> or medical basis for the claims, but there was also no basis for disproving them! Thus, the claims were made, and consumers relied upon those claims in making product choices without knowing of the total absence of credible evidence to support the claims.

JS, Ex. 25. The author of the legislation, Assembly member Byron Sher, cited several examples to highlight the deceptive nature of environmental advertising claims. *See* JS, Ex. 26 (Letter from Assembly member Sher to Governor Deukmejian). For instance, one manufacturer labelled its plastic bag as being "recyclable." In reality, the product was only recyclable if the consumer returned it to the manufacturer's plant in South Carolina. In another example, disposable diapers were labelled "biodegradable" when in truth, the plastics contained in the product would biodegrade only after hundreds of years and then only in ideal conditions. *Id.*[8]

These examples might suggest that to control the problem of potentially deceptive advertising a legislative body should be allowed great deference in deciding whether marketing claims are misleading. Cf. *National Com'n on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 161 (7th Cir. 1977) (agency determination on misleading nature of advertisement subject only to "substantial evidence" review). However, First Amendment analysis of commercial messages begins "with the content of the message and not the label given the message under the relevant statute." *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 651 n.9 (6th Cir.

---

[8] Plaintiffs themselves recognize that the terms regulated by section 17508.5 are potentially misleading. The National Food Processors Association, the Association of National Advertisers, Inc., the Grocery Manufacturers of America, Inc. and the American Association of Advertising Agencies petitioned the Federal Trade Commission to adopt guidelines to govern environmental advertising claims. *See* JS, Ex. 13. They acknowledged that "[a]t a time when environmental concerns have reached new heights, there is a great risk of deceptive practices." *Id.* at 4. Similarly, the American Paper Institute testified before the F.T.C. urging the agency to bring uniformity to environmental advertising claims because "[t]here is considerable confusion as to the appropriate content and context of such claims." JS, Ex. 14 at 2.

1991) (citation omitted); *see also Peel*, 110 S.Ct. at 2291-2292 ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review.").

It is the role of this court to exercise its independent judgment and determine whether the commercial messages in question warrant any First Amendment protection. If First Amendment scrutiny in the commercial speech arena is to have any bite at all, a legislative body cannot justify its restrictions on commercial speech simply by declaring that marketing claims are misleading. *See Puerto Rico Tele-Com, Inc.* v. *Ocasio Rodriquez*, 747 F. Supp. 836, 343 (D. Puerto Rico 1990) ("Wooden deference to a state's determination as to the misleading nature of an advertisement would obviously place in jeopardy some commercial speech that is in fact not misleading and thus deserving of at least limited First Amendment protection."). For this reason, the court cannot say that due to their allegedly misleading nature, the commercial messages at issue are not protected by the First Amendment at all.[9] However, the environmental advertise-

---

[9] Defendant-Intervenors' reliance on *Friedman* v. *Rogers*, 440 U.S. 1 (1978) to support their claim that the deceptive advertising addressed by section 17508.5 falls outside the orbit of First Amendment protection is misplaced. In *Friedman* the Court upheld a complete ban on the use of trade names in optometrists' advertisements because of the numerous possibilities for deception. The Court emphasized, however, that trade names have no intrinsic meaning and convey no information whatsoever about the nature of the services offered by an optometrist. *Id.* at 12. Moreover, the Court qualified its holding by explaining that restricting the use of trade names "has only the most incidental effect on the content of the commercial speech of . . . optometrists." *Id.*

By the same token, plaintiffs' reliance on *Peel* is misplaced. The *Peel* Court held that the potentially misleading nature of an attorney's statement on his letterhead that he was a "Certified Civil Trial Specialist" did not justify a "categorical ban" on such statements. 110 S. Ct. at 2292. But the Court explained that less restrictive regulations of commercial speech would be permissible: "to the extent that potentially misleading statements of private certification of specialization could confuse consumers, a State might consider screening certifying organizations, or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.*

ments in question are at least potentially misleading to the public and therefore some form of regulation is justified. Whether the regulation embodied in section 17508.5 survives First Amendment scrutiny is answered by considering the remaining elements of the *Central Hudson* test.

The second part of the *Central Hudson* inquiry requires no discussion for the parties agree that California's governmental interest in ensuring truthful environmental advertising and encouraging recycling and environmentally sound packaging is substantial.

The third prong of the *Central Hudson* test provides that regulations on commercial speech "directly advance" the governmental interest at stake. If a restriction provides only "ineffective or remote support" for the government's asserted policy goal, it fails under the First Amendment. 447 U.S. at 564. Likewise, "conditional and remote eventualities simply cannot justify silencing . . . promotional advertising." *Id.* at 569. The *Central Hudson* Court held that because there was an "immediate connection" between advertising and consumer demand for electricity, the government's interest in energy conservation was directly advanced by Public Utility Commission's order banning promotional advertising by electrical utilities. *Id.*

To reduce deceptive environmental advertising, section 175085 requires that when used by manufacturers or distributors of consumer goods in advertising or labels, the terms "ozone friendly," "photodegradable," "biodegradable," "recyclable" and "recycled" must meet the statutory definitions contained therein. The statute is premised on the belief that consumers have difficulty determining the veracity of the environmental claims advertisers make concerning consumer products. Given the confusion over what advertisers mean when they state, for example, that a product is recyclable or biodegradable, the legislature sought to level the playing field for all advertisers by requiring that they mean the same thing when using the terms set forth in the statute. As in *Central Hudson* there is an immediate connection in this case between environmental advertising and sales. Section 17508.5 governs

how manufacturers and distributors advertise the environmental attributes of their products and thereby decreases the chance that consumers will be misled by the use of undefined environmental terms.[10] For these reasons, the link between the uniform definitions mandated by section 17508.5 and the goal of ensuring that consumers understand the claimed environmental attributes of products is neither "tenuous" nor "speculative." *See Central Hudson*, 447 U.S. at 569.

In *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) the Court explained that "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *Id.* at 341. In *Fox* the Court clarified that the requisite fit need not be perfect, but simply reasonable. 109 S. Ct. at 3035; *see also Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 509 (1981) (plurality opinion) (third prong of *Central Hudson* test satisfied where legislative judgment is not "manifestly unreasonable"). In holding that Puerto Rico's ban on advertising casino gambling directly advanced the government's interest in reducing the demand for gambling, the *Posadas* Court looked no further than the reasonableness of the legislature's belief that advertising casino gambling increases the demand for gambling. 478 U.S. at 342. Similarly, the California legislature's belief that uniform standards for frequently used environmental advertising terms would promote the state's consumer protection goals, is clearly reasonable. Thus, the court finds that the statute under review directly advances the asserted governmental interest."[11]

---

[10] The ten state task force of Attorneys General came to the same conclusion: "Uniform definitions are needed . . . to ensure that marketers know what properties their products must possess before they can make these claims and to ensure that consumers get the accurate information they need to make informed purchasing decisions based on environmental considerations." JS, Ex. 3 at 1.

[11] Plaintiffs find great solace in *Lever Bros. Co.* v. *Maurer*, 712 F. Supp. 645 (S.D. Ohio 1989) where the court found that prohibiting use of the word "butter" on labels and advertisements except for products that were 100 percent butter did not directly advance the government's

Under the fourth prong of the *Central Hudson* framework, a restriction on commercial speech must be "no more extensive than necessary to further the state's interest." 447 U.S. at 569-70. Plaintiffs contend that because section 17508.5 prevents them from accurately describing their products' environmental attributes when such disclosures deviate from the statutory definitions, the statute fails to meet that standard.

If the last element of the *Central Hudson* test were interpreted strictly, as a "least-restrictive-means test," plaintiffs' reasoning might be persuasive. However, that construction was rejected in *Fox* where Justice Scalia explained that *Central Hudson* "requires something short of a least-restrictive-means standard." 109 S. Ct. at 3033. While acknowledging that past Supreme Court cases could be read to mean that restrictions on commercial speech are invalid if the governmental interest could be served as well by a more limited restriction, Justice Scalia announced that such a standard "would be incompatible with the . . . subordinate position of commercial speech in the scale of First Amendment values." *Id.* at 3034. The Court held that the fourth prong of the *Central Hudson* test imposes upon government the burden of establishing that a reasonable fit exists between the government's interest and the means chosen to advance that interest. A government meets its burden by demonstrating that a commercial speech regulation is "not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective." *Id.* at 3035. "By declining to impose, in addition, a least-restrictive-means requirement, we take account of the difficulty of establishing with precision the point at which restrictions become more extensive than their

---

interest in protecting its citizens from misleading information regarding food products when applied to a firm that sought to accurately advertise its dairy spread as containing 50 percent butter. *Id.* at 652. Plaintiffs argue that as with the word butter in *Maurer*, there is nothing inherently misleading about the terms covered by section 17508.5. The court disagrees. Unlike the word butter, terms like "ozone friendly," "photodegradable" and the like are not frequently used words enjoying a commonly agreed upon definition.

objective requires, and provide the legislative and executive branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.' " *Id.* (citation omitted).

Plaintiffs correctly point out that the restrictions on commercial speech imposed by Section 17508.5 prohibit the use of the terms in question when they don't meet the statutory definitions, even if qualifying or explanatory language is included to clarify how the term is being used.[12] For example, to make a claim that a product is recyclable, the statute provides that it must be "conveniently recycled . . . in every county in California with a population over 300,000 persons." Cal. Bus. & Prof. Code § 17508.5(d). Therefore, the statement that "this milk carton is recyclable in San Diego County" might violate the statute even if it is completely accurate. However, the fact that plaintiffs are prevented from making an accurate claim of this nature does not render section 17508.5 constitutionally infirm. Since the state has a substantial interest in encouraging recycling and reducing solid waste, it was reasonable for the legislature to require that a product can be advertised as "recyclable" only if it is recyclable in the 21 California counties with populations exceeding 300,000 people. Similarly, the truthful claim that a product is "recyclable where facilities exist" may imply to consumers that the product is recyclable in their local program even though that might not be the case. Such a claim, though factually correct, could be misleading and fail to advance the goal of encouraging recycling.

The same reasoning applies to claims regarding biodegradability. The statute requires that to tout a product as being biodegradable, it must "decompose in the most common environment where the material is disposed within one year

---

[12] The Attorney General responds to plaintiffs' argument by urging the court to narrowly interpret section 17508.5 as only applying when the terms in question are used without qualifying or explanatory language. Whether it would be proper for this court to adopt such a narrowing construction on a state statute which by its terms makes no such distinction, need not be resolved. Even without a narrowing construction, the statute is sufficiently tailored to promote its objective.

through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide." Cal. Bus. & Prof. Code § 17508.5(b). The claim that a product is "biodegradable, if composted" might be truthful, but if the product is only disposed in landfills, the alleged environmental attribute actually produces no benefit.

For these reasons, plaintiffs have not convinced the court that section 17508.5 is "substantially excessive, disregarding far less restrictive and more precise means." *Fox*, 109 S. Ct. at 3034. The California legislature decided that allowing manufacturers and distributors to evade the dictates of section 17508.5 by defining the terms themselves would not promote the state's consumer and environmental protection goals. Because such a policy determination is reasonable in light of Fox, "we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* at 3035.

In a final attempt to show that section 17508.5 violates the fourth prong of the *Central Hudson* test, plaintiffs present "less restrictive" alternatives which the California legislature could have adopted to regulate environmental advertising. For example, state officials could enforce with more vigor sections 17500 and 17580 of the Business and Professional Code, which contain general prohibitions on false advertising. This argument clearly fails, for nothing prevents a legislative body from adopting a specific law simply because a more general law already exists. Plaintiffs also suggest that to cure the potential for deceptive advertising, the legislature could have required that manufacturers and distributors use disclaimers or other qualifying language where necessary. As shown above, there is a substantial likelihood that qualifying language would not further the state's interests. In addition, the Supreme Court has specifically rejected the notion that the court should second guess a legislative decision to restrict speech rather than to require more speech. *See Posadas*, 478 U.S. at 344 (it was up to the legislature to decide that the goal of deterring casino gambling was better served by suppressing commercial speech that encourages gambling than by compelling speech designed to discourage it). Finally, this

court should not query whether *any* less restrictive measures exist to accomplish the asserted goals. The Fox Court, in reciting its previous upholding of a complete ban on off-site billboard advertising, stated: "we did not inquire whether *any* less restrictive measure (for example, controlling the size and appearance of the signs) would suffice to meet the city's concerns for traffic safety and esthetics." 109 S. Ct. at 3034 (citing *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 513 (1981)).

When the *Central Hudson* Court struck down a regulation banning all advertising by an electrical utility, the Court suggested several alternatives which it considered "no more extensive than necessary" to advance the goal of promoting energy conservation. These options included prescreening advertisements to ensure that they were not at odds with the government's conservation policy, restricting the format and content of the advertising, and compelling disclosures about the efficiency of the services offered. 447 U.S. at 571 & n.13. The fact that these "limited regulations" of commercial speech are all as, if not more, restrictive than the uniform definitions provided by section 17508.5 confirms that the California legislature has stayed within constitutional parameters in restricting commercial expression.

B. *Vagueness*

In its effort to regulate the "green marketing" phenomenon, plaintiffs contend that the California Legislature drafted an unconstitutionally vague statute. Section 17508.5(a) provides that "ozone friendly, or any *like term* which connotes that stratospheric ozone is not being depleted, means that . . . ." Cal. Bus. & Prof. Code § 17508.5(a). Section 17508.5(d) states that "recyclable means that an article can be *conveniently recycled* . . . in every county in California with a population over 300,000 persons." *Id.* § 17508.5(d). It is the ambiguity of these two phrases which allegedly pose constitutional problems.

The threshold question is what vagueness standard governs a proscription on commercial speech. Ordinarily, principles of

due process dictate that a criminal statute provide "adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Buckley* v. *Valeo*, 424 U.S. 3, 77 (1976) (citations omitted). Furthermore, when a law regulates conduct protected by the First Amendment, the vagueness doctrine demands an even "greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974) (footnote omitted).

Although the vagueness doctrine has never drawn a distinction between commercial and noncommercial speech, given the lesser constitutional protection accorded commercial speech, there may be little justification for applying the exacting vagueness test which obtains when a law infringes upon fundamental interests protected by the First and Fourteenth Amendments. *Cf. Friedman v. Rogers*, 440 U.S. 1, 12 (1979) ("when dealing with restrictions on commercial speech we frame our decisions narrowly, allowing modes of regulation that might otherwise be impermissible in the realm of noncommercial expression.").

As the Court noted in *Central Hudson*, there are at least two distinguishing features of commercial speech which allow for greater restrictions upon its content. First, because commercial speakers know the market and their product, they are uniquely positioned to assess the accuracy of their advertising claims and the lawfulness of their activity. Second, commercial speech springs solely from economic self-interest and is thus a resilient form of expression not vulnerable to being silenced by imprecise regulation. 447 U.S. at 564 n.6; *see also id.* at 571 n. 13 (commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply, and system of previewing advertising campaigns may be acceptable given adequate procedural safeguards); *Zauderer*, 471 U.S. at 668 (Brennan, J., concurring in part and dissenting in part) (a basic justification for allowing punishment for violations of imprecise commercial regulations is that businesspersons can clarify the meaning of

arguably vague regulations by consulting with governmental administrators).

For these reasons, the overbreadth doctrine has been found not to apply in the commercial speech context. *See, e.g., Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977) (although overbroad statutes may "chill protected speech," advertising is "linked to commercial well-being" and will therefore not be "crushed by overbroad regulation."). Of course, overbreadth is technically a standing doctrine which permits a party to challenge a law for impinging the First Amendment rights of others who are not before the court. Nonetheless, it is a close cousin to vagueness in that both doctrines recognize that imprecise statutes are of constitutional moment because they discourage people from exercising protected rights. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) ("overbroad laws, like vague ones, deter privileged activity . . . ."). *Bates* implies that although the vagueness doctrine may apply to commercial messages, a more relaxed inquiry may be appropriate.

In determining the vagueness standard for laws which do not reach any constitutionally protected conduct, the Court has explained:

> The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.

Village of Hoffman Est. v. *Flipside, Hoffman Est.*, 455 U.S. 489, 498 (1982) (footnotes omitted). Although the ordinance at issue in *Village of Hoffman*, unlike Section 17508.5, was a business licensing provision which implicated no commercial speech rights at all, the case does represent an implicit deter-

mination by the Supreme Court that in the commercial speech context, a statute need not rise to the level of precision required in noncommercial speech cases.

The relaxed vagueness test articulated in *Village of Hoffman*, although instructive, is not wholly controlling. The ordinance at issue in *Village of Hoffman* was punishable by fines of $10 to $500. Violation of Section 17508.5, on the other hand, is a misdemeanor punishable by imprisonment of up to six months and/or a fine not exceeding $1,000. Cal. Pen. Code § 19 (West 1988).[13] It goes without saying that the standard of certainty required in criminal statutes is more demanding than in noncriminal statutes because the consequences of imprecision are more onerous. *Village of Hoffman*, 455 U.S. at 498 (citing *Winters v. People of State of New York*, 333 U.S. 507, 515 (1948)). It would be unthinkable to incarcerate someone for violating a law which she could not possibly understand. *Barenblatt* v. *United States*, 360 U.S. 109, 137 (1959) (Black, J., dissenting).[14]

In light of all this, the court finds that in reviewing a commercial speech prohibition for facial vagueness which imposes criminal sanctions the question is whether the law affords fair notice to a business person of ordinary intelligence as to what conduct is illegal. The court now considers the challenged portions of section 17508.5.

The definition for "ozone friendly" is comprehensible on its face. The phrase "or any like term" is not ambiguous; it clearly refers to the modifying phrase "which connotes that stratospheric ozone is not being depleted." Cal. Bus. & Prof. Code § 17508.5(a). Section 17508.5(a) plainly brings within its scope only those advertising claims which suggest that the product does not deplete stratospheric ozone. The court is

---

[13] California law provides other penalties for violations of section 17508.5, including civil injunction and civil fines not exceeding $2,500. *See* Cal. Bus. & Prof. Code §§ 17535 & 17536 (West 1991).

[14] In an attempt to skirt the criminal nature of section 17508.5, the state argues that according to "traditional office policy," violations of the statute are always filed civilly, not criminally. This will not do, for "well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

confident that manufacturers and distributors of ordinary intelligence know whether their product—through its use or production—releases any chemical or material into the environment which will "migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone." *Id.*[15]

The statute's definition of "recyclable" is more uncertain. The problem is that while section 17508.5(d) defines a consumer good as "recyclable" if it can be "conveniently recycled" in California counties with more than 300,000 people, the statute offers no guidance as to what recycling programs satisfy the "conveniently recycled" requirement. Section 17508.5(d) refers to section 40180 of the Public Resources Code which unambiguously defines "recycled."[16] However, an equally lucid explication of "conveniently" is wanting. Nor is there any legislative history extant to provide the court with guidance.[17]

---

[15] Any uncertainty as to the "like terms" contemplated by section 17508.5(a) is settled by Federal Trade Commission Guidelines which explain that ozone-depleting materials include those substances listed as Class I and Class II chemicals in Title VI of the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, or others subsequently designated by the Environmental Protection Agency as ozone-depleting substances. Class I chemicals are chlorofluorocarbons (CFCs), halons, carbon tetrachloride and 1.1.1-trichloroethane. Class II chemicals are hydrochlorofluorocarbons (HCFCs). *See* Def. Opp., Ex. A at 26-27.

[16] Section 40180 of the Public Resources Code provides:

> "Recycle" or "recycling" means the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw materials for new, reused, or reconstituted products which meet the quality standards necessary to be used in the market place.

Cal. Pub. Res. Code, § 40180 (West 1992).

[17] At oral argument the Deputy Attorney General muddied the waters further by suggesting that "conveniently" may refer both to the technological ease with which a container can be recycled and the access consumers must have to recycling centers which accept the materials in question. Moreover, the relevant state agency has not promulgated any regulations which define "conveniently recycled."

Does a manufacturer or distributor incur criminal penalties for labeling a product as "recyclable" if the recycling center which handles such products is located in a remote part of the county, or, if it is only open one day a month? This may be a fanciful example, but in light of the legislature's failure to define "conveniently," "[w]here does fanciful possibility end and intended coverage begin?" *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964). Did the legislature mean to establish a requirement that a substantial majority of consumers must have access to recycling programs that collect the material in question? Or can a product be labeled recyclable as long as at least one facility exists in the county to collect the relevant materials? That questions of this nature so readily come to mind means that it is not sufficiently clear to a manufacturer or distributor of ordinary intelligence, what exactly the statute prohibits. Due to the potential for criminal sanctions, including incarceration, the absence of any standard for "conveniently recycled" wrecks this portion of section 17508.5 on the shoals of vagueness. Although the legislature "needs leeway" to advance its goals in the commercial speech arena, *Fox*, 109 S. Ct. at 3035, in this instance the constitutional requirement of definiteness has not been met.

It is an elementary principle of statutory construction that "the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (quoting *Allen* v. *Louisiana*, 103 U.S. 80, 83-84 (1881)). Under California law, the ability to sever an invalid portion of a statute depends on "whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute or constitutes a completely operative expression of the legislative intent and [is] not so connected with the rest of the statute as to be inseparable." *Metromedia, Inc. v. City of San Diego*, 32 Cal. 3d 180, 190 (1982) (citations omitted).[18]

---

[18] This is essentially the same standard employed to determine the severability of federal statutes: "Unless it is evident that the legislature

There can be no dispute that the California Legislature would have passed AB 3994 had they known that the definition of "recyclable" was invalid. Furthermore, the remainder of section 17508.5 retains its effectiveness as a constitutionally permissible regulation on commercial speech. Accordingly, the court holds that subsection (d) of the statute is invalid, but leaves the remainder of section 17508.5 intact.

IV. CONCLUSION

The California legislature has responded to the "green marketing" phenomenon by mandating statutory definitions for commonly used environmental advertising claims. Plaintiffs have made this facial challenge on First Amendment and vagueness grounds. This court holds that section 17508.5 permissibly restricts plaintiffs' commercial speech and, except for subsection (d), the statute is not unconstitutionally vague on its face.

Accordingly, the court GRANTS partial summary judgment for plaintiff solely with respect to subsection (d) of section 17508.5 of the California Business and Professions Code which is stricken as unconstitutionally vague. In all other respects, plaintiffs' summary judgment motion is DENIED and the court, *sua sponte*, GRANTS partial summary judgment for defendant.

IT IS SO ORDERED.

Dated: December 23, 1992

ss/MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

---

would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108-109 (1976) (quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

APPENDIX

ENVIRONMENTAL REPRESENTATIONS RELATING TO CONSUMER GOODS

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resource Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or brought for use primarily for personal, family, or household purposes.

(g) For the purposes of this Section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

Cal. Bus. & Prof. Code § 17508.5 (West 1991).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15644

D.C. No. CV-92-00660-MHP
Northern District of California
Filed: February 23, 1995

ASSOCIATION OF NATIONAL ADVERTISERS, INC.; GROCERY MANUFACTURERS OF AMERICA, INC.; SOAP AND DETERGENT ASSOCIATION; NATIONAL FOOD PROCESSORS ASSOCIATION; THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; THE AMERICAN PAPER AND FOREST ASSOCIATION; THE AMERICAN ADVERTISING FEDERATION; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs-Appellants

CALIFORNIANS AGAINST WASTE and
THE ENVIRONMENTAL DEFENSE FUND,

Intervenors-Appellees,

—v.—

DANIEL E. LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant-Appellee.

Before: CHOY and NOONAN, *Circuit Judges* and MARQUEZ, *District Judge.**

ORDER

A majority of the panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing is REJECTED.

---

* The Honorable Alfredo C. Marquez, Senior United States District Judge for the District of Arizona, sitting by designation.

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

28 U.S.C. § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations no actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 U.S.C. § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Business and Professions Code

§ 17508.5 Environmental representations relating to consumer goods

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

§ 17500. False or misleading statements

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

§ 17508. Claims based on factual, objective or clinical evidence, comparisons with other brands or products, or based on fact

a. It shall be unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact.

b. Upon written request of the Director of Consumer Affairs, the Attorney General, any city attorney, or any district attorney any person doing business in California and in whose behalf advertising claims are made to consumers in California, including claims that (1) purport to be based on factual, objective, or clinical evidence, that (2) compare the product's effectiveness or safety to that of other brands or products, or that (3) purport to be based on any fact, shall provide to the department or official making the request evidence of the facts on which such advertising claims are based. Any such request shall be made within one year of the last day on which such advertising claims were made.

Any city attorney or district attorney who makes a request pursuant to this subdivision shall give prior notice of such request to the Attorney General.

c. The Director of Consumer Affairs, Attorney General, any city attorney, or any district attorney may, upon failure of an advertiser to respond by adequately substantiating the claim within a reasonable time, or if such Director of Consumer Affairs, Attorney General, city attorney, or district attorney shall have reason to believe that any such advertising claim is false or misleading, do either or both of the following: (1) seek an immediate termination or modification of the claim by the person in accordance with Section 17535, (2) disseminate information, taking due care to protect legitimate trade secrets, concerning the veracity of such claims, or why such claims are misleading, to the consumers of this state.

d. The relief provided for in subdivision (c) is in addition to any other relief which may be sought for a violation of this chapter. Section 17534 shall not apply to violations of this section.

e. Nothing in this section shall be construed to hold any newspaper publisher or radio or television broadcaster liable for publishing or broadcasting any advertising claims referred to in subdivision (a), unless such publisher or broadcaster is the person making such claims.

f. The plaintiff shall have the burden of proof in establishing any violation of this section.

g. If an advertisement is in violation of subdivision (a) and Section 17500, the court shall not impose a separate civil penalty pursuant to Section 17536 for the violation of subdivision (a) and the violation of Section 17500 but shall impose a civil penalty for the violation of either subdivision (a) or Section 17500.

SUSAN J. HARRIMAN
JAMES E. BOASBERG
KEKER, BROCKETT & VAN NEST
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Attorneys for Plaintiffs

DANIEL E. LUNGREN, Attorney General
of the State of California
HERSCHEL T. ELKINS
Senior Assistant Attorney General
CHRISTOPHER M. AMES,
JOHN G. DONHOFF, JR.
Deputy Attorneys General
466 Golden Gate Avenue, Suite 6200
San Francisco, CA 94102-3658
Telephone: (415) 703-1802
Attorneys for Defendant DANIEL E. LUNGREN

(Additional Counsel Listed on Signature Page)

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-920660 MHP

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING

FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant.

PLAINTIFFS' AND DEFENDANT'S JOINT STIPULATION OF FACTS

Plaintiffs, The Association of National Advertisers, Inc., Grocery Manufacturers of America, Inc., The Soap and Detergent Association, National Food Processors Association, The Society of the Plastics Industry, Inc., The American Paper Institute, Inc., The American Advertising Federation, The American Association Of Advertising Agencies, The California Chamber of Commerce, and Chamber of Commerce of the United States and Defendant Daniel Lungren, sued herein in his official capacity as Attorney General of the State of California, enter into this Joint Stipulation of Facts intending to be bound thereby for the purpose of this litigation.

STIPULATED FACTS

THE PARTIES

1. Plaintiff The Association of National Advertisers, Inc. ("A.N.A.") is a non-profit trade association, organized under the laws of the State of New York. With more than 2,000 sub-

sidiaries, divisions and operating units, A.N.A. members market a variety of goods and services throughout the country. A central purpose of A.N.A. is to promote the common interests of businesses in advertising their products or services either regionally or nationally. Some A.N.A. members manufacture and/or distribute consumer products in California. Some A.N.A. members advertise and make statements to the public about their products in California.

2. Plaintiff Grocery Manufacturers of America, Inc. ("GMA") is a non-profit trade association of over 130 manufacturers of food and other consumer products, organized under the laws of the State of Delaware. Some GMA members manufacture and/or distribute their products in California. Some GMA members advertise and make statements to the public about their products in California. A central purpose of GMA is to advance the common interests of its members before governmental bodies and regulatory authorities. GMA has been active in presenting and advancing the views of its members on environmental issues.

3. Plaintiff The Soap and Detergent Association ("SDA") is a non-profit trade association organized under the laws of the State of Delaware. SDA is comprised of 143 companies engaged in the manufacture and distribution of soap and other cleaning products and the ingredients for those products. A principal purpose of the SDA is to advance the common interests of its member companies before federal and state legislatures, regulatory agencies and other governmental bodies. Some SDA members manufacture and/or distribute their products in California. Some SDA members advertise and make statements to the public about their products in California.

4. Plaintiff National Food Processors Association ("NFPA") is a non-profit trade association organized under the laws of the State of Delaware. The purpose of NFPA is to represent and advance the common interests of companies engaged in food processing and packaging on a wide variety of issues including environmental issues. NFPA is comprised of more

than 500 companies engaged in the manufacture and distribution of processed, packaged food products and food packaging and equipment. Some NFPA members manufacture and/or distribute their products in California. Some NFPA members advertise and make statements to the public about their products in California.

5. Plaintiff The Society of the Plastics Industry, Inc. ("SPI") is a national, not-for-profit trade association organized under the laws of the State of New York with more than 2,252 members representing all segments of the plastics industry in the United States. SPI members include resin manufacturers, distributors, machinery manufacturers, plastics processors and mold makers. Some SPI members manufacture and/or distribute consumer products and packaging for consumer products in California. Some SPI members advertise and make statements to the public about their products in California. One of the primary purposes of SPI is to represent its members in promoting plastics recycling throughout the United States.

6. Plaintiff The American Paper Institute, Inc. ("API") is a non-profit trade association organized under the laws of the State of Delaware. API's membership includes over 170 companies engaged in the business of manufacturing and distributing pulp, paper, paperboard and related products. Some API members manufacturer and/or distribute their products in California. The principal purpose of API is to promote the common goals of its member companies on a broad range of issues, specifically including environmental issues. Some API members advertise and make statements to the public about their products in California.

7. Plaintiff The American Advertising Federation ("AAF") is a national trade association organized under the laws of the District of Columbia. AAF members represent all elements of the advertising industry including companies that produce and advertise consumer products, advertising agencies, magazines and newspaper publishers, radio and television broadcasters,

outdoor advertising organization and other media. AAF members include twenty-one national trade associations, over two hundred local advertising clubs with 52,000 members, and over two hundred college chapters, with 6,000 student members. AAF's primary purpose is to respond to legislative and regulatory issues affecting the advertising industry at both the federal and state levels. AAF has been active in representing the common interests of the advertising industry before Congress, state legislatures and federal and state regulatory agencies. Some AAF members advertise and make statements to the public about their products in California.

8. Plaintiff The American Association of Advertising Agencies ("A.A.A.A.") is a national trade association organized under the laws of the State of New York. A.A.A.A.'s membership is comprised of over 730 advertising agencies doing business throughout the United States, including 77 agency companies with 201 offices in California. A.A.A.A. members create and place some 80 percent of all national advertising and substantial amounts of local and regional advertising in all 50 states including California. In addition, A.A.A.A. members provide a full range of marketing services to their clients including product promotion, public relations, direct marketing, merchandising, design and packaging services. A.A.A.A.'s purpose is to advance the common interests of the advertising industry and its has actively represented its members in connection with governmental efforts regarding the speech of its members.

9. Plaintiff The California Chamber of Commerce ("CCC") is a voluntary, non-profit California-wide association, with more than 3,800 members from virtually every industry and geographic section of the State. CCC is affiliated with and regularly communicates on current business issues with 387 local and regional chambers of commerce. A principal purpose of CCC is to advance the common interests of its members before the California Legislature, local governmental bodies and the courts on a broad range of issues affecting

business. Some CCC members manufacture and/or distribute various consumer goods in California. Some CCC members advertise and make statements to the public about their products in California.

10. Plaintiff Chamber of Commerce of the United States (the "Chamber") is a non-profit corporation organized and existing under the laws of the District of Columbia. As the nation's largest federal of businesses, the Chamber represents more than 180,000 businesses and business organizations throughout the United States, including over 20,000 in California. One of the Chamber's principal purposes is to represent the common interests of its members before the courts, Congress, the Executive branch, and the independent regulatory agencies of the federal government on issues of national concern to the business community. The Chamber's broad-based membership includes every industry represented by the other plaintiff-associations. Chamber members manufacture and/or distribute various consumer goods and packaging materials in California. Chamber members advertise and make statements to the public about their products in California.

11. Defendant Daniel Lungren is the Attorney General of the State of California. Under the provisions of the California Business and Professions Code, he is one party, among others, who may bring a civil or criminal action in his official capacity alleging violations of the provisions of Section 17508.5 of the California Business and Professions Code.

PLAINTIFFS' ACTIVITIES

12. Members of certain of the plaintiff-associations have been in the past distributed and continue to distribute a wide variety of consumer goods to retailers in the State of California and throughout the United States. Many of these products are used or consumed every day by consumers. Others of plaintiffs' members manufacture the packaging for such consumer products, including paper, plastic, glass and metal.

Some members of some of the plaintiff-associations make statements to the public about and engage in substantial advertisement of consumer goods, products and packaging, including their asserted environmental attributes.

13. During the past decade, there has been increasing public debate on the issue of solid waste disposal. Some members of some of the plaintiff-associations who manufacture and sell consumer products and use product packaging to protect and transport their products to the marketplace have made efforts to mitigate the possible effects of their products and packaging on the nation's solid waste stream. Some members of some of the plaintiff-associations have made statements to the public and have advertised to consumers what they claim are the environmental attributes of their products.

14. Some members of some of the plaintiff-associations, for example, have developed products in concentrated forms that require less product packaging. Others have introduced products in reusable containers. With respect to recycling, some members of the plaintiff-associations now use recycled paper or paperboard, plastic, metal and glass for packaging and others have worked to develop and implement improved recycling technology.*

15. With specific respect to plastics recycling, some members of the plaintiff-associations include recycled plastic in their plastic bottles. Some members of some of the plaintiff-associations have also devoted significant resources to the development and use of standardized plastic resin codes which now appear on most plastic bottles. These codes make it easier to sort plastics for recycling. In addition, some of plaintiffs' members participate in arrangements that provide an assured market for recycled plastic packaging for certain

---

* Except where specifically indicated, when used in the text of this Stipulation, the words "ozone friendly," "biodegradable," "photodegradable," "recyclable," "recycled" and "consumer good" are not used as defined in Section 17508.5 of the California Business and Professions Code. When used as so defined, they are enclosed in quotation marks.

types of plastic resin. Some of these companies have been working with state and local governments, consumer groups and others to increase the amount of plastic diverted from the solid waste stream through community recycling programs.

16. For example, as part of its efforts to encourage plastics recycling, the SPI—through its program The Council for Solid Waste Solutions—has published a national advertisement entitled "The Urgent Need to Recycle." A true and correct copy of the advertisement is submitted herewith as Exhibit 1.

17. Educating consumers about the environmental attributes of consumer products and packaging is one component in encouraging recycling. Recycling can be encouraged through product labeling and advertising. Some companies, including some member of some of the plaintiff-associations, have provided consumers with information that indicates whether product packaging is made from recycled materials and whether product packaging itself is capable of being recycled.

18. One member of a number of the plaintiff-associations now labels its plastic packages with the legend "Support Plastic Recycling." The following statement appears on the reverse side of the package:

> Please help! We are now using technology that can include recycled plastic in our bottles at levels between 25% and 35%. But to do so consistently, we need more recycled plastic. So please encourage recycling in your community.

A true and correct copy of the label is submitted herewith as Exhibit 2. This label was referred to in a report entitled "The Green Report II: Recommendations for Responsible Environmental Advertising" ("Green Report II"). Green Report II was published by an 11-state ad hoc Task Force of State Attorneys General, of which Attorney General Lungren was

a member. A true and correct copy of Green Report II is submitted herewith as Exhibit 3.

19. Submitted herewith as Exhibit 4 is a copy of part of a box label from Kellogg's Crispix which states on its front: "Carton Made From 100% Recycled Paper; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 5 is a copy of part of a box of Kellogg's Rice Krispies which on its front states: "Carton Made From 100% Recycled Paper; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 6 is a copy of part of a box label from General Mills' Cheerios which on its top states: "Carton Made From 100% Recycled Paperboard; Minimum 35% Post-Consumer Content." Submitted herewith as Exhibit 7 is a copy of a paper grocery sack manufactured by Trojan Kraft Bags, which on the bottom states: "32% Recycled Product From Post-Consumer Paper Fibers." Submitted herewith as Exhibit 8 is a copy of a plastic Quikmate grocery sack used by Lucky Supermarkets and manufactured by Sunoco which states: "Recycling at Lucky has come full circle. This bag contains at least 10% recycled material." Some of these companies are members of some of the plaintiff-associations.

20. Some members of some of the plaintiff-associations have claimed on product labels that packaging is made from recycled material or contains recycled material, that the product is recyclable or that the product is "coded" for recycling, referring to the plastic resin codes appearing at the bottoms of many plastic containers.

21. Some members of some of the plaintiff-associations also make representations on product labels and in advertisements about the claimed environmental attributes of the products themselves such as their biodegradability. Many products are used in or with water and are disposed of through community waste water systems. A number of manufacturers have in the past included statements on product packaging relating to the environmental effect of their products on the nation's water resources.

22. In addition to information contained on product labels, some members of some of the plaintiff-associations identify an 800 telephone number on product packaging, advising consumers that they may call at no charge to ask questions or obtain additional information about the products.

23. The terms defined by Section 17508.5 had been used in varied fashion by different advertisers when they made statements about the claimed environmental benefits of their packaging and/or products to the public in California. Proponents of the legislation urged upon the legislature that the terms themselves had no common and ordinarily accepted meaning and that although some of the terms had at some times been used in an appropriate manner, other times they had been used in either a misleading or deceptive manner.

THE STATUTE AT ISSUE

24. In 1990, the California Legislature enacted AB 3994, a bill which, *inter alia*, added Section 17508.5 to the California Business and Professions Code. California Business and Professions Code Section 17508.5 currently provides:

> 17508.5 It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:
>
> (a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resource Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family or household purposes.

(g) For the purposes of this Section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

25. The penalties for a violation of Section 17508.5 are set forth in California Penal Code Section 19 and California Business and Professions Code Sections 17534, 17535 and 17536.

26. The Federal Trade Commission ("FTC") has not adopted trade rules defining any of the terms addressed in Section 17508.5.

27. Some members of some of the plaintiff-associations have used in the past and wish to continue to use the terms ozone friendly, biodegradable, photodegradable, recyclable, and recycled in both non-commercial and commercial contexts. Some members of some of the plaintiff-associations have used in the past and wish to continue to use those terms in communicating with the public about environmental policies and the environmental attributes of consumer products in California.

28. On December 11, 1990, plaintiff The American Paper Institute, Inc., through its vice president, Robert T. McKernan, presented testimony to the ad hoc State Attorneys General Task Force dealing with the issue of environmental advertising and "The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising" ("Green Report I"). A copy of API's written presentation is submitted herewith as Exhibit 9. A copy of Green Report I is submitted herewith as Exhibit 10.

29. On March 14 and 15, 1990, the ad hoc Task Force of State Attorneys General concerned with deceptive environmental advertising held a first series of public hearings in St. Paul, Minnesota. Some members of some of the plaintiff-associations presented written and oral testimony at these hearings. For example, The Procter & Gamble Company submitted a letter, dated March 12, 1990, a copy of which is submitted herewith as Exhibit 11. Another member of some of the plaintiff-associations, The Dow Chemical Company, through Karl W. Kamena, Director, Government Affairs & Public Issues, also presented oral and written testimony at these hearings. A copy of a transcript of his oral testimony and a one-page written submission is submitted herewith as Exhibit 12.

30. Some members of some of the plaintiff-associations wish to make statements in advertising and on consumer packaging such as the following:

> a) "recyclable where facilities are available", even though the product or package cannot be "conveniently recycled" in every county in California with a population of over 300,000 persons;
>
> b) "package made from recycled industrial waste materials" or "package contains five percent recycled postconsumer waste material";
>
> c) that products are "biodegradable" or "photodegradable," even though that process may not occur within a one-year period.

31. The Kellogg Company, a member of some of the plaintiff-associations, has made the following statement on the top inside box panel of its Rice Krispies and Crispix products:

> Did you know that if Americans recycled all of our Sunday newspapers, we could save over 500,000 trees each week or 26,000,000 every year?
>
> Recycling plays a key role in protecting our environment and conserving natural resources. Kellogg Company encourages support of recycling efforts in your community.

Copies of the box labels are submitted herewith as Exhibits 4 and 5.

32. On February 14, 1991, plaintiff NFPA, joined by plaintiffs A.A.A.A., A.N.A., and GMA, filed a petition with the Federal Trade Commission calling for the adoption of federal guides relating to environmental advertising. A true and correct copy of the "Petition for Industry Guides for Environmental Claims Under Section 5 of the Federal Trade Commission Act" is submitted herewith as Exhibit 13. Plaintiff API, through its president, Red Cavaney, testified on July 18,

1991 before the Federal Trade Commission at hearings held to consider the petitions it had received regarding adoption of federal guides relating to environmental advertising. A true copy of the testimony of American Paper Institute, Inc. presented by Red Cavaney, President, to the Federal Trade Commission in July, 1991, is submitted herewith as Exhibit 14. A true copy of the "Testimony of the Society of the Plastics Industries, Inc. Before the Federal Trade Commission Regarding Environmental Marketing and Advertising Claims" is submitted herewith as Exhibit 15.

33. As a result of the adoption of Section 17508.5, members of the plaintiff-associations are concerned that, unless they use the words defined in the statute in the way they are defined in the statute, continued publication of their labels and advertisements in California will subject them to potential civil or criminal liability.

34. Following the adoption of Section 17508.5, Fisher Nut Company, a subsidiary of one member of a number of the plaintiff-associations, has chosen to eliminate environmental messages from its labels entirely. For example, before the passage of Section 17508.5, Fisher Nut Company placed the following legend on its package for a mixed nuts product:

> The body of this can is steel. This material is recyclable where steel recycling facilities exist. Support recycling in your community.

A true and correct copy of the label is submitted herewith as Exhibit 16. Fisher Nut Company determined that because of the passage of Section 17508.5 it should remove and removed that legend from the product label. The new label contains no reference to recyclability or recycling at all. A true and correct copy of the new label is submitted herewith as Exhibit 17.

35. Fisher Nut Company was not told by defendant or any other law enforcement official that its label violated Sec-

tion 17508.5 or that a civil or criminal prosecution would be commenced against it if the label was continued.

36. Another member of several of the plaintiff-associations, Del Monte Foods Company, determined that because of the adoption of Section 17508.5, it will not again publish in California two advertisements it previously published in magazines distributed throughout California. The first of these advertisements stated, under the heading "PRECIOUS METAL" and a picture of an ordinary steel can:

> The "tin" can may just be the world's perfect container. It's made of durable, high grade steel that is completely recyclable.* It saves energy because it requires no refrigeration. And the can is made, shipped and stored more economically than other packages. So the dollars you spend go more to the food you eat than the package that contains it. The steel can. Precious little could be done to improve it.

The advertisement concluded with the phrase "Food for Thought" followed by the Del Monte name and symbol. Under that in smaller print the footnoted material advised:

> Del Monte supports steel can recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 600 Anderson Drive, Pittsburgh, PA 15220.

A true and correct copy of the advertisement is submitted herewith as Exhibit 18. The second of these advertisements stated, under the heading "RECYCLING TIME" and a picture of a watch lying on a flattened steel can:

> This watch is a piece of junk. Its metal bearings are made entirely from recycled cans. In fact, the everyday "tin" can is made of 100% recyclable high grade steel. And if we all recycle, cans will provide the best means to build our bridges, skyscrapers, automobiles—even precision watches. The time to recycle is now.

The advertisement concluded with the phrase "FOOD FOR THOUGHT" followed by the Del Monte name and symbol. The footnoted material was identical to that set forth above. A true and correct copy of the advertisement is submitted herewith as Exhibit 19. The two advertisements triggered numerous requests from consumers in California to the Steel Can Recycling Institute about steel can recycling.

37. Del Monte Foods Company was not told by defendant or any other law enforcement official that either such advertisement violated Section 17508.5 or that a civil or criminal prosecution would be commenced against it if the advertisements were to continue.

PRIOR EXISTING LAW

38. Advertising and/or marketing claims that are "untrue or misleading" are prohibited in California under Section 17500 of the California Business and Professions Code. California law enforcement officials have relied on Section 17500 to prosecute allegations of false or misleading advertising in connection with environmental attributes.

39. For example, in June 1990, the Attorney General of the State of California brought an action against Mobil Chemical Company ("Mobil") under Section 17500 alleging that Mobil's environmental marketing claims in advertisements and labels stating that Hefty brand plastic garbage bags were "degradable" were untrue and misleading. The Attorney General sought an injunction and civil penalties. In June 1991 the Attorney General and Mobil entered into a stipulated settlement order under which Mobil, without admitting any liability or wrongdoing, agreed to stop using the "degradable" claim on Hefty bag labels and paid $25,000 to the State of California.

40. The Attorney General has also entered into stipulated agreements with other firms regarding the use by these firms of alleged untrue or misleading representations regarding the environmental attributes or waste disposal options for their

products or packaging. The California Attorney General based his involvement in these actions on alleged violations of Business and Professions Code Section 17500. These matters involved challenges to product and packaging claims of biodegradability, degradability, photodegradability, ozone safety, recyclability, compostability, ability to extend landfill life and general, but unspecified, environmental benefit.

41. In stipulating to enter into these agreements, none of the companies admitted that its advertisements were misleading and because these agreements were stipulated to, there are no court findings that these advertisements were misleading.

42. Section 17508 of the California Business and Professions Code was also in existence prior to the adoption of Section 17508.5 of the California Business and Professions Code.

43. The legislature has a substantial interest in prohibiting the use of untrue or misleading advertising, including advertising relating to the claimed environmental attributes of products and/or packaging.

44. Some local governments in California have spent millions of dollars creating curbside and other recycling programs. These programs have met with enormous consumer cooperation; post-consumer waste is being collected at rates beyond those originally projected for these programs and at a rate beyond that which recycling collectors can successfully market. Collectors have complained there is no market in California for the post-consumer resources they collect for recycling and frequently threaten to burn or landfill the resources they collect for recycling.

45. Steel cans are redeemable in a majority of counties in California. Some steel recycling plants exist in California in counties with populations in excess of 300,000; they do not exist in others.

46. There are seven plastic resin types commonly found in household packaging: polyethylene terephthalate ("PET") (primarily used in soft drink bottles), low density polyethelene ("LDPE"), high density polyethelene ("HDPE") (used in milk, water, juice and beverage bottles, bleach and detergent bottles), polyvinyl chloride ("PVC"), polypropylene (PP), polystyrene and other commingled plastics. Of those, two (2) types—PET and HDPE—are redeemable at most collection centers in California. In California, those who collect these two (2) types of plastic post-consumer waste and those recyclers who use them cannot get enough of these resources because large remanufacturing markets exist for the use of all collected post-consumer waste of this type. California law requires that all rigid plastic bottles and rigid plastic containers sold in California be labeled with a code which indicates which of the seven resin types identified above was used to produce the bottle or container. California Public Resources Code Section 18015.

47. Industrial waste (sometimes referred to as "mill scrap") has been recycled by some members of industry for years.

48. California consumers support local recycling programs and buy products based on their asserted environmental attributes. California consumers are likely to believe that generalized environmental claims made on packages in California are relevant in California.

49. During the years prior to the passage of Section 17508.5, there had been an increase in the amount of environmental product advertising disseminated before the public in California.

LEGISLATIVE HISTORY

50. AB 3994, the bill which added Section 17508.5 to the California Business and Professions Code, was sponsored by the Sierra Club and authored by Assembly Member Byron

D. Sher, Chairman of the Assembly Natural Resources Committee.

51. A true and correct copy of the Bill Digest on AB 3994, dated May 3, 1990, prepared for the Senate Committee on Business and Professions is submitted herewith as Exhibit 20. A true and correct copy of the Bill Digest on SB 1741, dated June 11, 1990, prepared for the Senate Committee on Business and Professions is submitted herewith as Exhibit 21. A true and correct copy of a memorandum, dated June 18, 1994, from Michael E. Kelly, Director of the Department of Consumer Affairs to the Senate Business and Professions Committee on AB 3994 is submitted herewith as Exhibit 22. A true and correct copy of the Bill Analysis prepared by the Department of Finance regarding AB 3994, dated May 24, 1990, is submitted herewith as Exhibit 23. A true and correct copy of the Enrolled Bill Report on AB 3994, dated August 27, 1990, submitted to the Governor by the Department of Consumer Affairs is submitted herewith as Exhibit 24. A true and correct copy of the Attorney General's letter to the Governor concerning AB 3994, dated September 10, 1990, is submitted herewith as Exhibit 25.

52. After AB 3994 was passed by the legislature, it was presented to Governor Deukmejian for signature. On signing the bill, Governor Deukmejian issued an approval message which stated:

> I have signed this date Assembly Bill No. 3994. This bill would make it unlawful for manufacturers and distributors to represent that their products are "ozone friendly", "biodegradable", "photodegradable", "recycled" unless the products meet specified standards. The bill also requires parties who make general environmental claims about their products (e.g., "environmentally friendly", "eco-friendly", or a "green product") to maintain records which substantiate the claim, and which are available to the public upon request. Violations

would be misdemeanors punishable by imprisonment in the county jail, fine, or both.

I am concerned that this bill makes no allowance for goods already in the stream of commerce which were manufactured and packaged before the effective date of this bill. Manufacturers and distributors would have to recall these products or run the risk of criminal prosecution if the product label did not meet the definition of the bill. This bill violates constitutional principles against retroactive application of criminal statutes.

I am also concerned with the definition of "recyclable" which is defined as meaning the articles can be conveniently recycled in every county in California with a population over 300,000. This term is impermissibly vague to be the basis of a criminal statute because it does not clearly state what is necessary to meet the test of convenience. Other definitions in the bill are too vague or overly strict.

Without specific definitions, manufacturers may be chilled from providing any labels, even when the packaging is more environmentally friendly than other packaging. This would be contrary to the goal that we all share to encourage packaging that is recyclable or environmentally sound.

The author has agreed to address these concerns with cleanup legislation next year. With this understanding, I approve this bill.

53. By letter dated September 24, 1990, Assemblyman Member Sher, the author of AB 3994, wrote to Governor Deukmejian concerning the bill. A true and correct copy of the letter is submitted herewith as Exhibit 26.

54. Shortly after Section 17508.5 became effective, Committee Chairman Sher, wrote to Attorney General Lungren, by letter dated January 10, 1991, requesting that the Attorney

General's office postpone enforcement of the law until such time as the California Legislature had the opportunity to clarify its provisions. A true and correct copy of the letter is submitted herewith as Exhibit 27. By letter dated January 14, 1991, Committee Chairman Sher wrote to Attorney General Lungren clarifying his letter of January 10, 1991. A true and correct copy of the letter is submitted herewith as Exhibit 28.

55. By letter dated October 18, 1991, Committee Chairman Sher advised Attorney General Lungren that a bill to amend Section 17508.5 (A.B. 144) had failed to pass the Legislature. Some of the plaintiff-associations opposed passage of certain versions of A.B. 144. In his letter of October 8, 1991, Chairman Sher also formally withdrew his request that the Attorney General and local prosecutors postpone enforcement actions under the statute and urged them to begin immediate enforcement of the law. A true and correct copy of the letter is submitted herewith as Exhibit 29. The Attorney General responded to Assemblyman Sher by letter dated October 30, 1991. A true and correct copy of the letter is submitted herewith as Exhibit 30.

56. To date, no law has been enacted to amend the provisions of Section 17508.5.

57. Attorney General Lungren has not brought any actions alleging a violation of Business and Professions Code Section 17508.5, nor has he told the plaintiffs or any member of any plaintiff association that he intends to bring such an action.

58. Recycling programs exist in various places in California for various types of materials, some of which are run by governmental authorities and some by private parties. These programs range from curb-side pickup to dropoff at collection centers, which may be located at varying distances from the consumer. Some programs require the consumer to presort the materials for recycling while others do not.

SUSAN J. HARRIMAN
JAMES E. BOASBERG
KEKER, BROCKET & VAN NEST
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400

By: ss/ JAMES E. BOASBERG
James E. Boasberg

FLOYD ABRAMS
SUSAN BUCKLEY
CAHILL GORDON & REINDEL
80 Pine Street
New York, NY 10005
Telephone: (212) 701-3000

Attorneys for Plaintiffs

Dated: July 23, 1992

DANIEL E. LUNGREN,
Attorney General of the
State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney
General
CHRISTOPHER M. AMES,
JOHN G. DONHOFF, JR.
Deputy Attorneys General
446 Golden Gate Avenue
Suite 6200
San Francisco, CA 94102-3658
Telephone: (415) 703-1802

By: ss/ C. M. AMES
Christopher M. Ames

ALBERT NORMAN SHELDON
SUSAN E. HENRICHSEN
Deputy Attorneys General
110 West A Street, Suite 700
San Diego, CA 92101
Telephone: (619) 237-7754

Attorneys for Defendant
DANIEL E. LUNGREN

DANIEL E. LUNGREN, Attorney General
of the State of California
HERSCHEL T. ELKINS
Senior Assistant Attorney General
CHRISTOPHER M. AMES,
Deputy Attorney General
455 Golden Gate Avenue, Suite 6200
San Francisco, California 49102-3658
Telephone: (415) 703-1802

ALBERT NORMAN SHELDEN,
SUSAN E. HENRICHSEN,
Deputy Attorneys General
110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7754

Attorneys for Defendant DANIEL LUNGREN

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-920660 MHP
Date: 9/18/92, Time: 10:30 AM
Dept: 5 (Judge Patel)

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., THE AMERICAN PAPER INSTITUTE, INC., THE AMERICAN ADVERTISING

FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE CALIFORNIA CHAMBER OF COMMERCE; and CHAMBER OF COMMERCE OF THE UNITED STATES,

Plaintiffs,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California,

Defendant

CALIFORNIANS AGAINST WASTE and ENVIRONMENTAL DEFENSE FUND

Defendant-Intervenors

MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT DANIEL LUNGREN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * *

[33] about what these terms mean are endless. The legislature was within its legal prerogative to define them.

Further, unlike the regulations in *Lever Brothers Co. v. Maurer*, 712 F. Supp. 645 (S.D. Ohio 1989) and *Anderson, Clayton & Co. v. Washington State Department of Agriculture*, 402 F. Supp. 1253 (W.D. Wash. 1975), which prohibited the use of the term butter even when the term was conditioned by other language, the legislature in adopting Section 17508.5 did *not* prohibit the use of the defined terms when used in conjunction with other terms which explain how the defined term is being used differently than defined in the statute. Certainly if the legislature had wished to prohibit the use of these terms, it knew how to accomplish this task. Not only did it not do that, it also did not prohibit the use of these words in combination with other explanatory words.

Defendant respectfully suggests the correct way to interpret Section 17508.5 is as follows: the legislature only meant to define the words of the section when they are used in isolation, because then, without an agreed upon definition, they carry a great potential to be misleading; further the definition has no application when the words are used in conjunction with modifiers which adequately dispel deception. Such an approach to statutory interpretation was recently approved of by the California Supreme Court in another First Amendment challenge to a statute. *See*, *Moore v. California State Board of Accountancy*, California Supreme Court No. S017399, 92 Daily Journal D.A.R. 9506 (July 2, 1992). There the Court held that a regulatory * * *

[43] two prongs of *Central Hudson*.

In doing so, it must be remembered that in effect, both of these tests "require a balance between the governmental interest an the magnitude of the speech restriction." *San Francisco Arts & Athletes, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537, n. 16 (1987).

(1) Section 17508.5 Directly Advances the Governmental Interest in Preventing Deceptive Environmental Advertising

Section 17508.5's requirement that, when used by manufacturers and distributors of consumer goods, the words "ozone friendly," "photodegradable," "biodegradable," "recyclable," and "recycled" meet the statutory definition when used in advertisements and on labels without explanation results in reduced deceptive "environmental attribute" advertising. Of course, as pointed out above, if manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms, then

---

methods to save landfill space; (f) preserving virgin resources; and (g) preventing unfair competition which would result when (1) products which possess environmental benefits because manufacturers of such products spent the resources necessary to develop products which are more environmentally benign, (2) must compete with products which do not possess similar environmental benefits but advertise such benefits nonetheless.

California further has a substantial interest in protecting the public from claims which have the capacity to mislead members of the public about the state of recycling in California. If advertisers make claims about the recyclability of given products or packaging when such cannot be recycled in California, consumers not only may be mislead, but may become frustrated and then disregard accurate statements made regarding recyclability. California has an interest in protecting consumers from this frustration which could ultimately injure truthful recycling efforts.

[44] Section 17508.5 has no application.

Consumers usually are unable to determine for themselves the validity of an environmental claim made for consumer goods. They must rely on the truthfulness of the advertiser for the validity of the claim. Where, as in the market situation which pre-dated the adoption of Section 17508.5, (*See*, *supra*, pages 2-5) there was much confusion and uncertainty over what different advertisers meant when they used the same terms, it was only proper for the legislature to bring a level playing field to all advertisers. By requiring that all advertisers mean the same thing when using the terms set forth in Section 17508.5 without explanation, the legislature both: (1) ensured "that the stream of commercial information flows cleanly as well as freely," *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748, 771-772 (1976), so that consumers could rely on the truthfulness of the claims made; and, (2) encouraged those advertisers who wished to make truthful and meaningful environmental product claims, but were uncertain as to the standards, to make such claims.

As the state had shown that the use by optometrists of optometrical trade names was deceptive in *Friedman v. Rogers*, 440 U.S. 1, 13, (1979), and thus could be banned, so too, here the use of environmental terms which have no common meaning to sell products can cause confusion and deception. Yet the legislature did not ban their use, it merely said that when used without definition by the advertiser, these terms mean the following: "(a) 'ozone friendly . . . means . . . , etc." This statute * * *

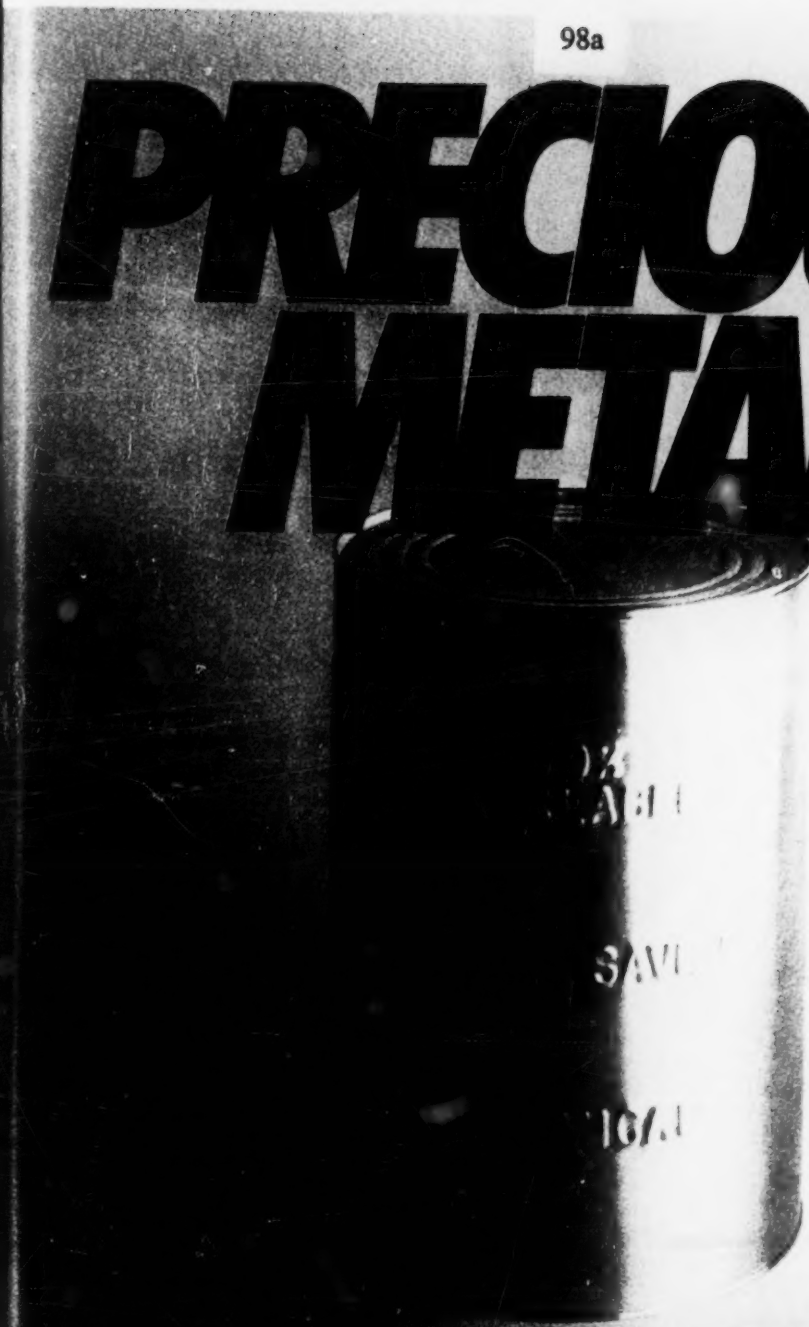
[47] meets the " 'fit' between the legislature's ends and the means chosen to accomplish those ends" as required by the Court in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 341 (1986) and *Fox, supra*, 492 U.S. at 480.

Thus, manufacturers and distributors are free to advertise the claimed environmental attributes of their products so long as they fully explain what the words they use mean in relation to the claim for that product. Section 17508.5 will thus have a similar effect to that the Court found the regulation in *Friedman v. Rogers*, 440 U.S. 1 (1979) to have. In upholding the ban on optometrists being able to advertise under trade names, the Court said the ban would, "rather than stifling commercial speech, ensure that information regarding optometrical services will be communicated more fully and accurately to consumers than it had been in the past when optometrists were allowed to convey the information through unstated and ambiguous associations with trade names." *Id.*, at 16.

Likewise, Section 17508.5 merely conditions the use of terms which had been used in an ambiguous fashion so that they are now less likely to be used in a deceptive manner. It tells advertisers to either use the terms as defined or tell the public how the term is being used in the advertisements.

Plaintiffs seek to have this Court "second guess" the judgment of the California Legislature regarding the most effective means of curtailing deception in the environmental marketing arena. Plaintiffs imply that because Business and Professions Code Sections 17500 and 17508 existed at the time * * *

PRECIOUS METAL



...container just be the world's perfect container. It's made of durable, high-... steel that is completely recyclable.* It saves energy because it requires no ... production. And the can is made, shipped and stored more economically than other packages. ... dollars you spend go more to the food you eat than the package that contains it. ... steel can. Precious little could be done to improve it.

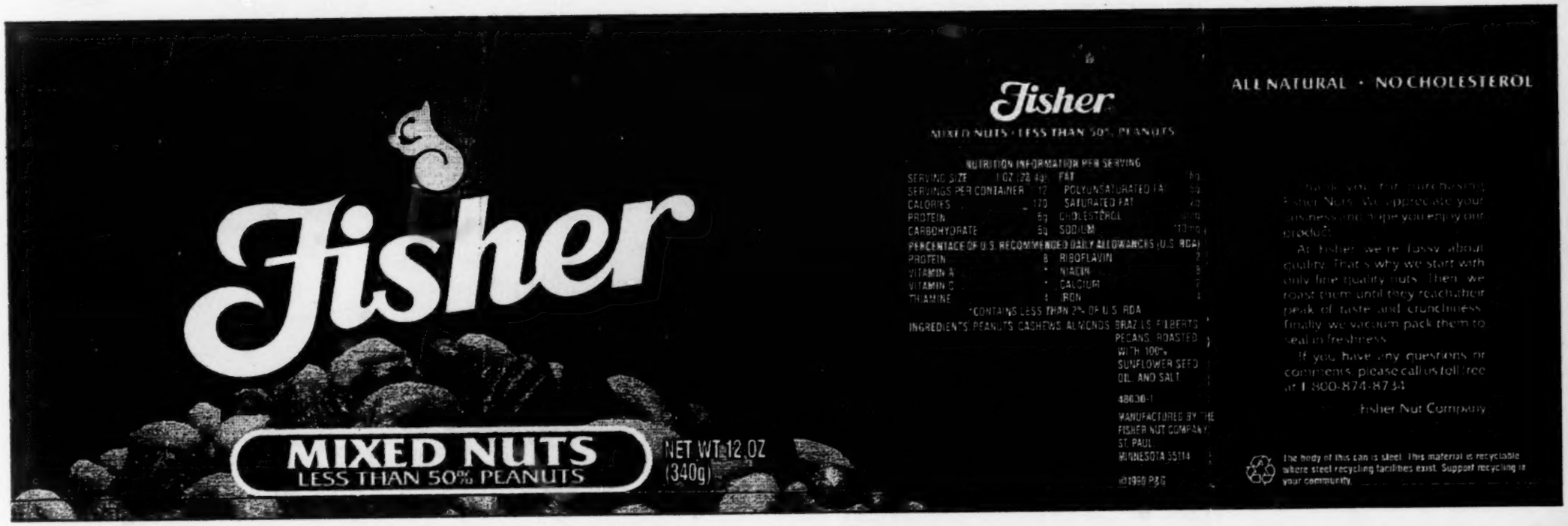
FOOD FOR THOUGHT Del Monte Quality

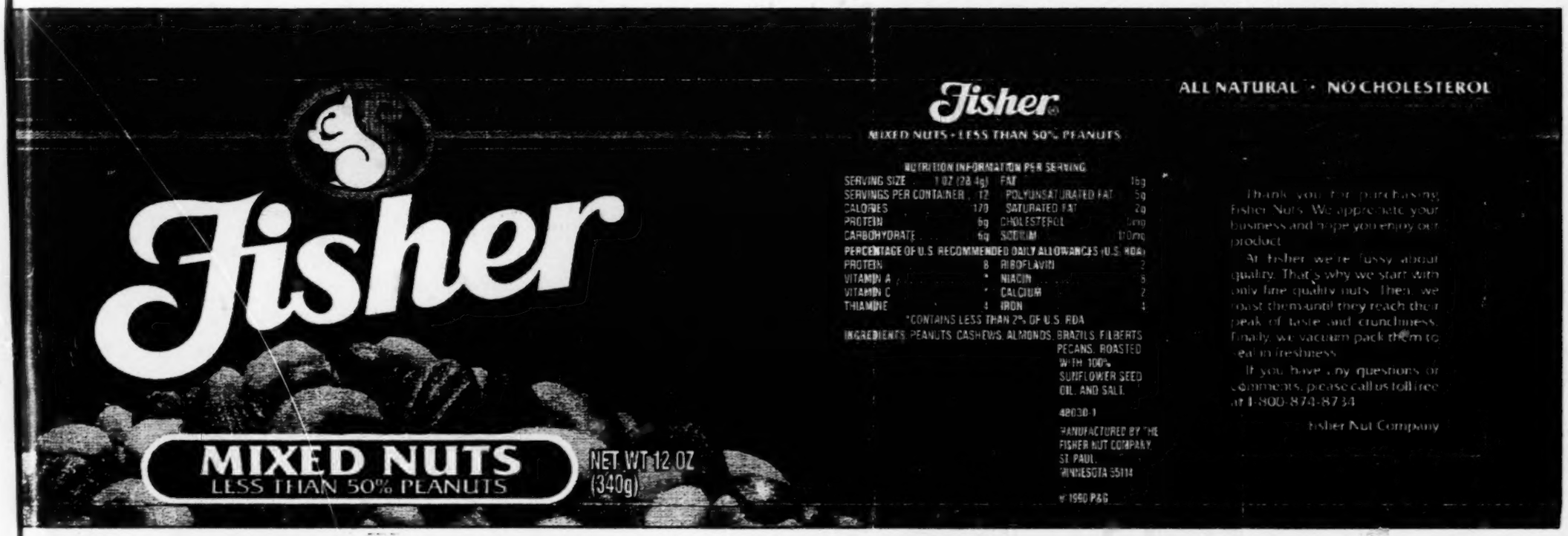
*...recycling. For information about recycling in your area, please contact the Steel Can Recycling Institute, 680 Anderson Drive, Pittsburgh, PA 15220.

RECYCLING TIME

This watch is a piece of [illegible]
In fact, the everyday "tin" can [illegible]
will provide the best means to [illegible]
watches. The time to recycle is [illegible]

Del Monte Quality


Fisher
MIXED NUTS
LESS THAN 50% PEANUTS
NET WT 12 OZ
(340g)
Fisher
MIXED NUTS • LESS THAN 50% PEANUTS
NUTRITION INFORMATION PER SERVING
SERVING SIZE 1 OZ (28.4g)
SERVINGS PER CONTAINER 12
CALORIES 170
PROTEIN 6g
CARBOHYDRATE 6g
FAT 8g
POLYUNSATURATED FA 3g
SATURATED FAT 2g
CHOLESTEROL 0mg
SODIUM 110mg
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)
PROTEIN 8
VITAMIN A *
VITAMIN C *
THIAMINE 4
RIBOFLAVIN 2
NIACIN 8
CALCIUM 2
IRON 4
*CONTAINS LESS THAN 2% OF U.S. RDA
INGREDIENTS: PEANUTS, CASHEWS, ALMONDS, BRAZIL FILBERTS, PECANS, ROASTED WITH 100% SUNFLOWER SEED OIL, AND SALT
48630-1
MANUFACTURED BY THE FISHER NUT COMPANY ST. PAUL MINNESOTA 55114
©1990 P&G
ALL NATURAL • NO CHOLESTEROL
Thank you for purchasing Fisher Nuts. We appreciate your business and hope you enjoy our product.
At Fisher, we're fussy about quality. That's why we start with only fine quality nuts. Then we roast them until they reach their peak of taste and crunchiness. Finally, we vacuum pack them to seal in freshness.
If you have any questions or comments, please call us toll free at 1-800-874-8734.
Fisher Nut Company
The body of this can is steel. This material is recyclable where steel recycling facilities exist. Support recycling in your community.


Fisher
MIXED NUTS
LESS THAN 50% PEANUTS
NET WT 12 OZ
(340g)
Fisher
MIXED NUTS • LESS THAN 50% PEANUTS
NUTRITION INFORMATION PER SERVING
SERVING SIZE 1 OZ (28.4g)
SERVINGS PER CONTAINER 12
CALORIES 170
PROTEIN 6g
CARBOHYDRATE 6g
FAT 15g
POLYUNSATURATED FAT 5g
SATURATED FAT 2g
CHOLESTEROL 0mg
SODIUM 170mg
PERCENTAGE OF U.S. RECOMMENDED DAILY ALLOWANCES (U.S. RDA)
PROTEIN 8
VITAMIN A *
VITAMIN C *
THIAMINE 4
RIBOFLAVIN 2
NIACIN 6
CALCIUM 2
IRON 4
*CONTAINS LESS THAN 2% OF U.S. RDA
INGREDIENTS: PEANUTS, CASHEWS, ALMONDS, BRAZILS, FILBERTS, PECANS, ROASTED WITH 100% SUNFLOWER SEED OIL, AND SALT.
42030-1
MANUFACTURED BY THE FISHER NUT COMPANY ST. PAUL, MINNESOTA 55114
© 1990 P&G
ALL NATURAL • NO CHOLESTEROL
Thank you for purchasing Fisher Nuts. We appreciate your business and hope you enjoy our product.
At Fisher, we're fussy about quality. That's why we start with only fine quality nuts. Then, we roast them until they reach their peak of taste and crunchiness. Finally, we vacuum pack them to seal in freshness.
If you have any questions or comments, please call us toll free at 1-800-874-8734.
Fisher Nut Company

(2)

No. 94 - 1930

Supreme Court, U.S.
FILED
JUL 7 1995
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

v.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

**On Petition For A Writ of Certiorari To
The United States Court of Appeals For the Ninth Circuit**

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF RESPONDENT DANIEL E. LUNGREN

DANIEL E. LUNGREN,
Attorney General of the
State of California
HERSCHEL T. ELKINS,
Senior Assistant
Attorney General
***ALBERT NORMAN SHELDEN**
Supervising Deputy
Attorney General

***Counsel of Record**
July 7, 1995

SUSAN E. HENRICHSEN
CHRISTOPHER M. AMES
Deputy Attorneys
General
110 West A Street,
Suite 1100
San Diego, CA 92101
(619) 645-2089
***Attorneys for
Respondent,
Daniel E. Lungren***

BEST AVAILABLE COPY

52pp

QUESTION PRESENTED

Whether a state legislature can define terms used to advertise products--"ozone friendly," "biodegradable," "photodegradable" and "recycled"--which have no common, agreed upon meaning so as to prevent deceptive advertising and foster environmental protection goals by requiring all advertisers who choose to use one of the defined terms when selling a consumer product to mean the same thing.

TABLE OF CONTENTS

Page

Question Presented. i

Table of Contents. ii

Table of Authorities. iv

STATEMENT OF THE CASE. 2

A. Factual Background of This Action. 3

1. What the Statute Does. 3

2. The Scope of the Statute. 6

B. The Environmental Advertising Milieu Prior to Adoption of Section 17508.5. 8

REASONS TO DENY THE WRIT. 16

PETITIONERS MISCONSTRUE THE STATUTE, THE RECORD AND THE NINTH CIRCUIT'S DECISION. 16

A. The Statute Makes No Distinction Between "For Profit" and "Not For Profit" Speakers Nor Does It Discriminate Based on Viewpoint. 16

B. The Court of Appeals and the District Court Properly Ruled That Section 17508.5 Meets This Court's Tests for a Statute Which Affects Commercial Speech. . . . 19

Page

1. The Ninth Circuit Correctly Ruled That the Harm Dealt With by Section 17508.5 Is Real. 19

2. The Ninth Circuit Correctly Ruled That Section 17508.5 Advances the Governmental Interest. 21

3. The Ninth Circuit Correctly Ruled That Section 17508.5 Is Sufficiently Tailored to Its Goal. 25

CONCLUSION. 30

APPENDIX. 1Ra

TABLE OF AUTHORITIES

Cases — Page

Actmedia, Inc. v. Stroh, 830 F.2d 957 (9th Cir. 1986). 22n

Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989). 19-20, 26-27

Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980). 19, 22, 30

City of Cincinnati v. Discovery Network, Inc., 113 S.Ct. 15054 (1993). 20, 23-24

Edenfield v. Fane, 113 S.Ct. 1792 (1993). 20-21, 23-24

Florida Bar v. Went For It, Inc., No. 94-226 (decided June 21, 1995). 19, 21, 26-28

Ibanez v. Florida Department of Business and Professional Regulation, 114 S.Ct. 2084 (1994). 20-21, 23n-24n

Ohralik v. Ohio State Bar Assn, 436 U.S. 447 (1978). 19, 26

Page

Pacific Gas and Electric Co. v. Public Utilities Comm. of California, 475 U.S. 1 (1986). 8

Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico, 478 U.S. 328 (1986). 20, 22, 27, 29

R.A.V. v. City of St. Paul, 112 S.Ct. 2538 (1992). 17-18

Rubin v. Coors Brewing Co., 115 S.Ct. 1585 (1995). 22-27

Standard Oil of California v. F.T.C., 557 F.2d 653 (9th Cir. 1978). 22n

United States v. Edge Broadcasting Co., 113 S.Ct. 2696 (1993). 20, 22, 26-27

Virginia State Board of Pharmacy v. Virginia Citizens Council, 425 U.S. 748 (1976). 4

Constitutional Provisions

U.S. Const. Amend. 1. . . . . *passim*

Page

Federal Authorities

15 U.S.C. § 1606, 12 C.F.R. 226. 3

15 U.S.C. § 2000, 40 C.F.R. 600. 3

15 U.S.C. § 2800, 16 C.F.R. 306. 3

Nutrition Labelling and Education Act of 1990, Pub.L. No. 101-535, 104 Stat. 2353 (1990), 21 C.F.R. 101. 3

FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. 260. . . . . 13n

State Statutes

California Business and Professions Code § 17508.5. . . . . *passim*

Other Authorities

"Consumer Purchasing Behavior and the Environment" Abt Associates. 13

EPA, "Evaluation of Environmental Marketing Terms in the United States," EPA 741R-92-003, February, 1993. . . . . 5n, 13

"The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising," November 1990. . . . . 9-11, 13

Page

Gardner, "How Green Were My Values: Regulation of Environmental Marketing Claims," 23 Univ. of Toledo L.Rev. 31 (Fall, 1991). 11n

Grodsky, "Certified Green: The Law and Future of Environmental Labelling," Yale Journal on Reguation, Vol. 10 No. 3, 147-227, 150-151 (Winter, 1993). 11n

Petition for Industry Guides for Environmental Claims Under Section 5 of the Federal Trade Commission Act, February 14, 1991; National Food Processors Association, Petitioner. 11-12

No. 94 - 1930

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

v.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

**On Petition For A Writ of Certiorari To
The United States Court of Appeals For the Ninth Circuit**

**BRIEF IN OPPOSITION OF RESPONDENT
DANIEL E. LUNGREN, ATTORNEY GENERAL OF CALIFORNIA**

Respondent Daniel E. Lungren, Attorney General of the State of California, respectfully requests that this Court deny the Petition for Writ of Certiorari since the Ninth Circuit Court of Appeals and the district court both correctly decided this matter. The Court of Appeals

decision is reported at 44 F.3d 726 and is reprinted in Petitioners' Appendix at 1a-33a.[1/]

STATEMENT OF THE CASE

This case asks the following question: can a state legislature, which finds the marketplace being filled with a growing number of advertisements using meaningless environmental "buzz" words to sell consumer goods, act to protect the public and foster its environmental goals by adopting legislation which defines such terms, so that when an environmental claim using one of the defined terms is made in an attempt to sell products, the public will know that such claim is not deceptive and that products so advertised meet the threshold definition and, therefore, are at least more environmentally benign than products which cannot so advertise? To accomplish this purpose, the California Legislature adopted §17508.5 which, rather than banning the use of such ambiguous words, defined them and required that all manufacturers and distributors of consumer products, whether "ecologically oriented" or not and whether "non-profit" or "for profit," who wish to use such words when advertising the environmental attributes of their consumer products meet the definitional requirements.

The Court of Appeals for the Ninth Circuit, based upon the completeness of the record before it, agreed with the district court, and properly answered that a state legislature can so act. The courts below fully considered and correctly decided the issues presented in this matter, properly applied the requirements of this Court and, thus,

---

1. Further cites to documents reprinted in the Appendix attached to petitioners' Petition for Writ of Certiorari ("Petition") shall be referenced as "Pet. App. (page)."

there simply is no error which would require the Court to grant the Petition for Writ of Certiorari.

A. Factual Background of This Action

1. What the Statute Does

Section 17508.5 of the California Business and Professions Code (reprinted in the Respondent's Appendix ("Ra") hereto at 1Ra-2Ra) does no more than countless other statutes on the state and federal level do--it gives meaning to ambiguous terms by defining them. Many federal statutes define terms *and* require that such terms be used in advertisements to the public.[2/] Similar to laws such as the Federal Food, Drug and Cosmetic Act, which was amended by the Nutrition Labeling and Education Act of 1990,[3/] California Business and Professions Code §17508.5 does not require advertisers to use any prescribed terms, but only requires that if manufacturers or distributors of consumer goods choose to make environmental attribute claims for their products by use of the terms defined in the statute, then the statutory definition of the terms must be met. Through laws such as

---

2. *See, e.g.*, 15 U.S.C. 1606, 12 C.F.R. 226, et seq., which defines terms such as "finance charge" and "Annual Percentage Rate" and requires the latter's use in advertisements for loans; 15 U.S.C. 2800, et seq., 16 C.F.R. 306, which defines how one determines "Octane Rating" and establishes when it is to be used in certain advertisements for gasoline; and 15 U.S.C. 2000, et seq., 40 C.F.R. 600, et seq., which defines "fuel economy" and establishes when the term must be used in advertisements for automobiles.

3. Pub. L. No. 101-535, 104 Stat. 2353 (1990) and 21 C.F.R. 101 which includes definitions of terms such as "low fat," "light," and "high fiber"; *see, also,* cases cited in the Court of Appeals's decision, Pet. App. page 20a, n.3.

these, Congress and the states have long required that all advertisers who make claims about their products mean the same thing when using the same term.

That is what the California Legislature did when it adopted §17508.5 and defined the terms "ozone friendly," "biodegradable," "photodegradable," and "recycled." By giving these terms, which, petitioners' assertions notwithstanding, have no commonly accepted definition, a uniform definition, and requiring that a manufacturer or distributor who wishes to use such terms in its advertisements use the terms in a way which meets the statutory definition, the legislature did no more than ensure that the "stream of commercial information [about the claimed environmental attributes of consumer products] flows cleanly as well as freely." *Virginia State Board of Pharmacy v. Virginia Citizens Council,* 425 U.S. 748, 771-772 (1976) (brackets added); Court of Appeal decision, Pet. App. 19a. In our economy, it is essential that commercial advertising must flow truthfully to protect consumers who buy products because of an advertised attribute and to protect the legitimate business person from unfair competition committed by those who would use "catch phrases" or the latest "buzz" words in a deceptive manner.

The Court of Appeals's opinion correctly affirmed the district court's holding that "the environmental advertisements in question are at least potentially misleading to the public and therefore some form of regulation is justified." Pet. App. 14a. The reason for this is two-fold: first, the terms defined in §17508.5 are not common terms with common definitions; and, second, "circumstantial factors objectively ascertainable, with some difficulty, by the consumer," are needed to be known in order to test the veracity of the advertising claim made for the product. Pet. App. 14a-15a. Thus, the court below correctly concluded that "In the less favorable

circumstances prevailing in many areas of California, use of these terms could well be misleading." *Id.* The Ninth Circuit's decision was based on the completeness of the record herein which conclusively shows that such terms are "potentially misleading," i.e., they have the capacity to mislead the public.[4/]

Since consumers can neither easily verify the accuracy of the environmental claim made by manufacturers or distributors in advertisements for their products, nor compare the environmental attributes of various products if advertisers are using the same terms but each advertiser means something different when using the same term, the California Legislature to prevent fraud and deception could, without violating the First Amendment, require that manufacturers and distributors who wish to

---

4. *See,* Joint Stipulation of Facts ("JS") reproduced at Pet. App. 70a-91a, specifically ¶23 (at 79a), ¶28-29 (at 81a), ¶39-41 (at 85a-86a) and ¶48-49 (at 87a); note 4, *infra*; and, EPA, "Evaluation of Environmental Marketing Terms in the United States," (EPA 741R-92-003), February, 1993, of which portions of pages i-iv of the Executive Summary are reprinted at 3Ra-12Ra, and pages 77-85 of this EPA Report. In these latter pages, the EPA details 49 cases brought by state Attorneys General, the FTC, local Departments of Consumer Affairs and the Better Business Bureau's National Advertising Division, against manufacturers and distributors because of the allegedly deceptive use of environmental claims in advertising and on labels. Settlements of these matters were announced between October 1990 and July 1992, although the investigations began before these dates. Of these actions, approximately 35 involved allegations that the words "degradable," "recycled" or "ozone friendly" or a variation of them (i.e., "photodegradable," "ozone safe," etc.) were used in a deceptive and misleading manner. These cited portions of the record all show that, unlike petitioners' assertion that there is only one piece of evidence to support the legislature's conclusion that the regulated words were potentially misleading (Petition at 20), there are many bases to support the conclusion by the legislature that these words had been used in a deceptive manner.

make environmental claims for their consumer products mean the same thing when they use the same words. In this way, the legislature sought to ensure that the marketplace was free from deception, that advertisers whose products positively benefitted the environment could so advertise the environmental benefits of their products and that consumers interested in buying products with certain environmental attributes could purchase these products and know that they could trust the truthfulness of the claims made for these products. The petitioners are seeking a Writ of Certiorari simply because they do not like the Court of Appeals's decision, not because of any errors made by that court.[5/]

2. The Scope of the Statute

Since this matter arises on a facial challenge to the statute, it must be borne in mind that the only "advertisements" before the courts below were those that the petitioners chose to bring to the attention of the

---

5. The Ninth Circuit finding that the harm was real, and that the district court correctly also found that the harm was real, was based upon the substantial evidence in the record to support this conclusion. If there is question about this, Respondent Lungren respectfully addresses the Court's attention to the numerous items in the record which are also cited: at pages 6-13, 34-35, and 40-42 of Defendant-Appellee Lungren's Brief On Appeal; at pages 2-5, 18-20, 23-25 and 33-36 of Intervenors-Appellees Californians Against Waste and The Environmental Defense Fund's Brief On Appeal; the Joint Stipulation of Facts of Defendant Lungren and Plaintiffs Association of National Advertisers, et al. and the 30 exhibits thereto; the 281 page Joint Supplemental Excerpts of Record of Appellees Daniel Lungren and Californians Against Waste and The Environmental Defense Fund ("SER"); the 249 page Excerpts of Record of Plaintiffs-Appellants Association of National Advertisers, et al. ("ER"); and, at pages 3-7, 21-22 and 27-28 of Brief on Appeal of Amici Curiae California Resource Recovery Association, et al. *See also*, note 3, *supra.*

courts--assumedly the "worst case scenarios" for the statute. Contrary to petitioners' assertions at pages 5-7 of their Petition, nothing in the statutory language, as it was written by the legislature and correctly interpreted by the lower courts, prevents petitioners' members from telling the whole world that "Del Monte supports steel can recycling" or that "The 'tin' can may just be the world's perfect container" or even that "This watch is a piece of junk." Such advertisements are not representations about consumer goods the manufacturer or distributor is trying to sell through the use of one of the defined terms of §17508.5. As such, the statute has no application to such statements.[6/]

Any "chilling effect" the petitioners claim the statute has comes from their own tortured reading of the statute and not from either the plain language of the statute or the Court of Appeals's interpretation of it. If petitioners were to apply the court's ruling to their future advertising, they would know exactly what advertising §17508.5 covers and what it does not cover. In short, the statute in no way touches upon those types of expression traditionally entitled to complete First Amendment protection. The permissible limits set on commercial speech by §17508.5 contrast with violative restrictions placed on noncommercial speech because §17508.5 does not "penalize the expression of particular points of view and force speakers to alter their

---

6. Neither Respondent Attorney General Lungren nor any other California law enforcement office has sought to enforce the statute by bringing any action alleging a violation of §17508.5, nor has he told any petitioner or any member of any petitioner association that he intends to bring such an action against any of them. JS ¶57; Pet. App. 90a. Thus, as set forth in JS ¶35 and ¶37, Pet. App. 83a-85a, neither of the companies who claim to have ceased their advertisements because of §17508.5's adoption (Petition 6-7), were ever told that these advertisements violated §17508.5.

speech to conform with an agenda they do not set." *Pacific Gas and Electric Co. v. Public Utilities Comm. of California*, 475 U.S. 1, 9 (1986).

B. The Environmental Advertising Milieu Prior to Adoption of Section 17508.5

"NEW! DEGRADABLE!"

"MAXIMUM DEGRADABILITY"

"OZONE SAFE"

"ENVIRONMENTALLY DEGRADABLE"

"RECYCLED"

Beginning in the late 1980's, these and other environmental claims for consumer products were hurled at consumers in advertisements and on product labels throughout the country. Marketers had discovered that consumers were interested in the "environmental revolution" and products which helped them play a role in improving their environment. "Green Marketing"--the touting of claimed environmental attributes for consumer products--came of age.

> "'Green Marketing' has become the marketing craze of the 1990's. The American public is increasingly concerned about environmental issues, and people are looking for ways to do their part . . . . The increasing interest in the environmental consequences of purchasing decisions has not been lost on the business community. . . . Many companies have begun claiming that their products provide some benefit to the environment . . . . Unfortunately, attempts to take advantage of

> consumer interest in the environment have led to a growing number of environmental claims that are trivial, confusing or even misleading.
>
> ". . .
>
> "Business has been quick to respond to this growing consumer interest in 'environmentally safe' products. In the past year, American businesses have advertised hundreds of products as 'degradable,' 'recyclable,' 'recycled,' 'ozone friendly' or otherwise good for the environment, and even more new 'environmentally friendly' products are on corporate drawing boards. A survey . . . indicated that some 5,700 new 'green' packaged goods would be introduced in 1989 alone. "Luring Green Consumers: Companies Pursue the Ecology Minded Shopper," *N. Y. Times*, August 6, 1989, at §3, p.12." The Green Report,[7/] SER 15, 19.

Not surprisingly, as this type of advertising grew nationally, the amount of environmental product advertising in California also increased during the years preceding the passage of §17508.5. The problem, however, was that

---

7. Because of the increased problems engendered by the use of deceptive environmental advertising claims, an ad hoc group of state attorneys general formed in November, 1989 and held a first set of public hearings in St. Paul, Minnesota in March, 1990. Approximately 40 individuals from industry, consumer and environmental groups and government testified and almost 100 such groups were in attendance. Based on the testimony at these hearings and written submissions received by the group, the ad hoc attorney general group issued a report entitled "The Green Report: Findings and Preliminary Recommendations for Responsible Environmental Advertising," November 1990 ("The Green Report"). This report is attached to the Joint Stipulation of Facts as Exhibit 10 and to the SER at pages 12-83.

contrary to the petitioners' assertion that these terms of environmental advertising have a common ordinarily understood meaning, Petition 3, they simply do not. The record in this case shows that the terms used in these environmental advertisements and on labels were used differently by different advertisers. JS ¶23; Pet. App. 79a. Not all advertisers meant the same thing when they labeled their products "photodegradable" or "recycled" or "ozone friendly."

> "Both environmental groups and business representatives noted the growing confusion surrounding many environmental marketing claims and stated their belief that such confusion was fertile ground for abusive practices. Three reasons were consistently given for the growing confusion. First, the words commonly used in environmental marketing, such as 'environmentally friendly,' 'degradable,' 'recyclable,' and 'ozone friendly' have no clear, uniform meaning. . . ." The Green Report, SER 27.[8/]

---

8. The Green Report also indicated that adoption of non-deceptive standardized definitions was particularly important in that:

> "consumers have become increasingly willing to change their purchasing habits in ways that will reduce environmental problems: consumers have begun to seek out products they believe are better for the environment and to avoid products they believe contribute to environmental problems. Several polls and surveys document this trend. . . . "Consumers Go Green," *Advertising Age*, September 25, 1989, at 3. 2/
>
> "Note 2:
>
> More recent polls and surveys report similar findings. A nationwide survey . . . found that 78% of all respondents would pay up to 5% more for

There can be no doubt that in California and nationally there was confusion as to the meaning of the words used to advertise the claimed environmental benefits of advertisers' products.[9] Because of this, the more enlightened in the business community knew that environmental product claims made by manufacturers and retailers should be made with care. For example, in February 1991, the National Food Processors Association ("NFPA"), The Association of National Advertisers, Inc. ("ANA"), Grocery Manufactures of America, Inc. ("GMA"), and The American Association of Advertising Agencies ("AAAA"), all of whom are plaintiffs in this action and petitioners herein, filed a petition with the Federal Trade Commission ("FTC") calling upon the FTC to adopt "Industry Guides for Environmental Claims Under Section 5 of the Federal Trade Commission Act."[10] In the preamble to this petition these plaintiffs state, *inter alia*:

> "As discussed below, industry members, state Attorneys General, and others who are concerned

---

> 'environmentally sound' containers and 47% would pay up to 15% more. . . .In a July 1990 poll conducted by the Roper Organization, consumers reported that they would pay an average of 6.6% more for environmentally sound products. Env't Rep. (BNA) at 691 (Aug. 3, 1990.)" [End Note 2.]

The Green Report, SER 19-20.

9. *See*, Gardner, "How Green Were My Values: Regulation of Environmental Marketing Claims," 23 Univ. of Toledo L. Rev. 31, 45-52 (Fall, 1991) and Grodsky, "Certified Green: The Law and Future of Environmental Labelling," Yale Journal on Reguation, Vol. 10 No. 3, 147-227, 150-151 (Winter, 1993).

10. A copy of that petition can be found at ER 68-95.

that claims in this area be truthful and nondeceptive have urged that the Commission issue such Guides. . . .

"Despite the numerous benefits that flow from truthful environmental claims, there is a reluctance on the part of many members of industry to make such claims. This reluctance stems, in part, from the absence of available guidance regarding the interpretation regulators are likely to place upon various statements of environmental benefit. . . .

"At the same time, there may be firms that are willing to take advantage of the absence of clear rules for environmental marketing by making claims that are unsubstantiated or otherwise deceptive. Presumably such firms could become the subject of Federal Trade Commission investigations, but neither the Commission nor the states is in a position to police all such claims. . . .

"At a time when environmental concerns have reached new heights, there is a great risk of deceptive practices." ER 68-71.

Other petitioners have also publicly acknowledged the need for definitions to provide meaning to these terms.

"API believes that some form of standardized definitions and guidelines should be developed to provide meaning to environmental terms used in product advertising and labeling. . . . we believe there is, in all probability, a strong government role required." American Paper Institute (since this litigation began, API has changed its name to American Forest & Paper Association), SER 7.

Possibly these positions recognizing the need for some uniformity to prevent deception and confusion were taken by some of the petitioners[11] and other business people because consumer surveys showed the existence of this confusion among the public at large. *See, e.g.*, "Consumer Purchasing Behavior and the Environment," Abt Associates, SER 195, 200. For instance, although businesses use the term "recycled" to mean many things,[12] it is not unusual for consumers to believe that the term "recycled" when used on a product's label means that the product has been made from other products which have previously been used by consumers, thrown away by those consumers and remade into new products. *See, e.g.*, The Green Report, SER 32-33 and 50; EDF Testimony, SER 219, text and note 12; Cude Testimony, SER 278-280; and the EPA Report, EPA 741R-92-003, wherein at 9Ra, the authors indicate that: "Several factors common to environmental attributes exacerbate the confusion over these marketing terms. Environmental claims . . . pertain to characteristics of a product with which a consumer generally has little or no experience or comparative information. Consumers, therefore, cannot evaluate the credibility or value of such claims. . . . Finally, many terms used in environmental labeling are not part of everyday language and are often poorly understood."

---

11. Similar additional comments also appear in the record at: ER 68-95 (Petition to FTC); ER 101-119 (Comments of API to FTC); ER 120-127 (Comments of Society of the Plastics Industry, Inc., to FTC); and SER 84-87 (letter from The Procter & Gamble Company to Minnesota Attorney General).

12. For example, some manufacturers include use of their own "spills" and "mill scrap" within the term, others only include mill scrap they buy from others, and others only consider "post consumer" waste to be within the term's meaning. *See, e.g.*, The Green Report, SER 32-33 and FTC Guides for the Use of Environmental Marketing Claims, SER 94-122, 115-119.

In addition to the need to halt the continuation of the deceptive advertising that resulted from the use of undefined terms in environmental advertising, the California Legislature was also aware that California is facing a tremendous solid waste problem, that the public is concerned about it and that the public wants to help become part of the solution--rather than only adding to the problem. By defining environmental terms to include minimal threshold standards, the legislature was not only able to ensure that manufacturers who so labeled their products would be making products which were more environmentally benign, but also that consumers would have the knowledge that buying products which carried the defined environmental terms would be a step toward helping to solve the solid waste problems California faced.

This being the marketplace world with which the California Legislature was faced when considering the bill which became §17508.5 (AB 3994), the author of the bill was able to state:

> "This measure is designed to address the increasing problem of false or misleading environmental claims made about certain consumer products. [¶] Specifically, the bill makes it unlawful for manufacturers and distributors of consumer products to represent that their products are 'ozone friendly,' 'biodegradable,' 'photodegradable,' 'recyclable' or 'recycled' unless the products meet standards specified in the bill. . . . [¶] Recent public opinion polls show that there has been a strong resurgence of environmental awareness on the part of the public. Consumers are increasingly interested in purchasing products which are beneficial to the environment. In reaction to this consumer preference, product manufacturers have begun to label and advertise thousands of products as

> environmentally friendly. Unfortunately, this has lead to widespread confusion on the part of the public as to which products are truly environmentally sound and which are merely being advertised as such to promote sales. AB 3994 will establish objective standards which will provide the public and law enforcement with the ability to determine which products are indeed not harmful to the environment." Letter of September 7, 1990 from Assemblyperson Byron Sher to Governor George Deukmejian.[13/]

See, also, for an explanation of what the legislature and various departments of California state government believed the purposes of AB 3994 were, the following: the Office of Senate Floor Analyses Report to the full Senate membership, LH 1; Enrolled Bill Report of the California Air Resources Board, LH 2; Enrolled Bill Report of the California Department of Finance under date of "8-24-90" wherein the Department changed the "opposition" position expressed in its "5-24-90" Report (ER 183-184), to a position of deferral to other State agencies, LH 3; Report of the California Department of Conservation, LH 6; letter of September 10, 1990, from Attorney General John K. Van de Kamp to Governor George Deukmejian, SER 88-89[14/]; and letter of January 10, 1991, from

---

13. This letter is attached to Appellees' Californians Against Waste and the Environmental Defense Fund Motion for Judicial Notice filed August 31, 1993, as Legislative History ("LH") 5.

14. This letter states in part as follows: "In recent years we have seen an increase in questionable 'environmental' advertising with claims such as 'environmentally friendly,' 'biodegradable,' and 'recyclable' being utilized with virtually no scientific support. . . . [¶]Environmental claims are similar to the 'health' claims made for elixirs in the Old West. There was no scientific or medical basis for the claims, but there was also no basis for disproving them!

Assemblyperson Sher to Attorney General Daniel Lungren, ER 190[15].

Thus, it is clear that the legislative intent in adopting §17508.5 was to address the problems caused by deceptive environmental advertising, not by outlawing such advertising but by requiring that it be truthful and meaningful and that products which so advertise themselves were at least more environmentally benign than those that could not so advertise.

REASONS TO DENY THE WRIT

PETITIONERS MISCONSTRUE THE STATUTE, THE RECORD AND THE NINTH CIRCUIT'S DECISION

A. The Statute Makes No Distinction Between "For Profit" and "Not For Profit" Speakers Nor Does It Discriminate Based on Viewpoint

In their Petition, the petitioners seem to have given up their claim that §17508.5 is unconstitutional because it infringes upon their "non-commercial" speech and accepted

---

Thus, the claims were made, and consumers relied upon those claims in making product choices without knowing of the total absence of credible evidence to support the claims. This kind of activity prevents consumers from making intelligent marketplace choices. Worse, this practice unfairly rewards businesses who are deceptively attempting to capitalize on the public's heightened awareness of the environmental consequences of their buying decisions. [¶]Enactment of AB 3994 would establish clear statutory standards for industry and consumers alike. . . ."

15. "The Attorney General and district attorneys enforce its [Section 17508.5] provisions just as they currently enforce other deceptive advertising statutes . . . . the intent of the bill was not to discourage environmental advertising, but to ensure more truthful environmental advertising . . . " ER 190.

the correct conclusion of both the Court of Appeals (Pet. App. 13a), and the district court that the statute only concerns "commercial speech," Pet. App. 44a. Of course, such a conclusion is compelled by the statutory language itself.

Seizing upon a statement made by Judge Noonan in his dissent (Pet. App. 32a), petitioners now seem to argue that the statute violates their First Amendment rights because it makes a distinction between "for profit" speakers and "not for profit" speakers. Petition at 11-12 and 25-27. The statute, of course, makes no such distinction. By its clear terms it pertains to "any person." Thus, it applies to any "non-profit" seller in exactly the same fashion as it applies to "for profit" sellers. When a "non-profit"--be it the Environmental Defense Fund, Green Peace, or Californians Against Waste--tries to sell consumer goods which it manufactures or distributes, it can no more mislead the public about the products' environmental attributes than can the members of petitioners' trade associations. The statute simply applies to all--"any person"--manufacturers and distributors of consumer goods who make environmental claims *about* their products.

This is certainly not the type of "viewpoint" discrimination this Court was talking about in *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538 (1992). There the concern was that in similar situations--for example, in debates advocating racial tolerance or intolerance--different speakers could not use the same words because of governmental favoritism toward one speaker (those in favor of racial tolerance) over another (those opposed to it).

For that reason, the Court found the St. Paul ordinance an unconstitutional restriction on free speech.[16/]

Petitioners incorrectly argue that the §17508.5 creates such a distinction between speakers. It clearly does not. No manufacturer or distributor speaker, regardless of his or her view on what is best for the environment and regardless of whether the speaker is "for profit" or "not for profit," can make one of the four environmental advertising attribute claims defined in §17508.5 about his or her consumer product unless the product being advertised meets the definition of the claim set forth in the statute. All speakers are treated equally. Further, all speakers are treated equally in the political debate over what is best for the environment. All speakers can say whatever they want, argue in favor of whatever position they want, using whatever words they want, including the words defined by §17508.5. The California Legislature did not engage in view-point discrimination when it adopted §17508.5 and

---

16. This Court's discussion of the invalidity of a St. Paul ordinance which dealt not with commercial speech at all, but with a ban on the use of "fighting words" that insulted, or provoked violence, "on the basis of race, color, creed, religion or gender" shows clearly the petitioners' misreliance on this case.

> ". . . those arguing *in favor* of racial, color, etc. tolerance and equality . . . could hold up a sign saying, for example, that all 'anti-Catholic bigots' are misbegotten; but [that speaker's opponent could not hold up a sign saying] that all 'papists' are, for that would insult and provoke violence 'on the basis of religion.' St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules." *R.A.V. v. City of St. Paul*, 112 S.Ct. at 2548 (brackets added).

Thus, it is clear that the petitioners's reliance on the last sentence quoted above (Petition at 26) is inapposite.

that is why the Court of Appeals ruled correctly when it held the test of constitutionality the statute must pass is the four-prong intermediate scrutiny test for commercial speech set forth by this Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980).

B. The Court of Appeals and the District Court Properly Ruled That Section 17508.5 Meets This Court's Tests for a Statute Which Affects Commercial Speech

1. The Ninth Circuit Correctly Ruled That the Harm Dealt With by Section 17508.5 Is Real

Continually following the test it set forth in *Central Hudson*, the Court has reiterated, as it recently did in *Florida Bar v. Went For It, Inc.*, No. 94-226 (decided June 21, 1995), that although commercial speech is protected, it enjoys "'a limited measure of protection, commensurate with its subordinated position in the scale of First Amendment values' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 477 (1989), quoting *Ohralik v. Ohio State Bar Assn*, 436 U.S. 447, 456 (1978)." *Florida Bar*, slip op. at 5. The petitioners' protestations notwithstanding, the *Florida Bar* decision shows that these standards, as applied by the Court of Appeals and the district court in ruling that §17508.5 is valid, have not been changed by the Court. As previously stated by the Court:

> "Commercial speech, however, is 'linked inextricably' with the commercial arrangement it proposes, . . . so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself. . . . For this reason, laws

> restricting commercial speech, unlike laws burdening other forms of protected expression, *need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.*" *Edenfield v. Fane*, 113 S.Ct. 1792, 1798 (1993) (Emphasis added.)

The petitioners attack on the decision below because of a claimed failure to discuss *Edenfield* and two other decisions of this Court--*City of Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993) and *Ibanez v. Florida Department of Business and Professional Regulation*, 114 S.Ct. 2084 (1994), which found various statutes violative of the First Amendment--is without merit. A court, of course, need not critique in its analysis all other cases which involve the area under review in order to reach the correct result. This Court, for instance, did not mention these cases in its decision in *United States v. Edge Broadcasting Co.*, 113 S.Ct. 2696 (1993), wherein it upheld against a First Amendment challenge a federal law which prohibited a radio station in one state from advertising a neighboring state's legal lottery. Not surprisingly, in attempting to attack the Court of Appeals's opinion herein, the petitioners fail to discuss *Edge*, which relied heavily on this Court's decision in *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986), and which in turn was heavily relied on by the Court in its *Fox* decision. The Court of Appeals in its decision herein relied substantially on the Court's decisions in both *Fox* and *Posadas*.[17]

---

17. It must also be pointed out that the Court of Appeals does discuss *Cincinnati* and *Edenfield* in reaching its conclusion that §17508.5 only effects commercial speech. Thus, the court was well aware of these cases, but for the reasons explained, *infra*, correctly did not think they compelled a different conclusion.

As pointed out *supra*, pages 2-16, a review of the record in this matter shows that unlike the situations in *Edenfield* and *Ibanez*, where the Court found there was nothing in the record to substantiate the licensing boards' conclusions that the prohibited practices caused anything more than "purely hypothetical harm," in this matter, as in the record the Court recently approved of in *Florida Bar*, there is much evidence of real harm. And as in *Florida Bar*, the petitioners herein at no time refute the record "save by the conclusory assertion that the rule lacked 'any factual basis.'" Slip op. at 10.[18] Thus, the Court of Appeals correctly stated: "Appellees and amici have cited numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5." Pet. App. 17a.

2. The Ninth Circuit Correctly Ruled That Section 17508.5 Advances the Governmental Interest

The Court of Appeals held that the Legislature sought:

> ". . . to guard against a direct, predictable and ongoing result of potentially specious claims or ecological puffery about products with minimal environmental attributes. This supposition is sufficiently reasonable and substantiated to support the district court's finding of an adequate fit . . . . In short, we find sound support for the California

---

18. In fact, although petitioners continually argue that the harms the state recites are "purely speculative," at page 17, note 11 of their Petition, they state: "Petitioners have in the past recognized, and do so now, that the terms regulated by Section 17508.5 could be used in ways that are confusing or misleading to some consumers."

> Legislature's conclusion that ecological claims boost consumer demand for products that do not always measure up. Given this nexus between commercial representations and consumption, the standardization of terms used in commercial representations about a product's environmental attributes is directly related to California's undisputedly substantial interests in truthful environmental advertising and conservation." Pet. App. 17a-18a.

Where, as in the market situation which pre-dated the adoption of §17508.5, there was an explosion of environmental advertising with much attendant confusion and uncertainty over what different advertisers meant when they used the same terms, it was only proper for the legislature to bring some order out of chaos. As did the Court in *Central Hudson*, 447 U.S. at 569, in *Posadas*, 478 U.S. at 344, and in *Edge*, 113 S.Ct. at 2707, (and as the Court intimated recently in *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995), when it indicated that advertising "is an influential weapon" in telling consumers about a product's attributes), the Court of Appeals in this case recognized that the legislature could conclude that there is an immediate connection between advertising and demand for the item advertised, and thus the advertising could be regulated to prevent deception. Pet. App. 16a-18a.

As the courts below held, the record in this case shows that there is a direct link between environmental advertising and sales.[19/] Thus, §17508.5 provides the "immediate connection" required by *Central Hudson*, 447 U.S. at 569--"the link between the uniform definitions

---

19. *See, e.g.*, Joint Stipulation of Facts ¶48, Pet. App. 87a; *Actmedia, Inc. v. Stroh*, 830 F.2d 957 (9th Cir. 1986); *Standard Oil of California v. FTC*, 557 F.2d 653 (9th Cir. 1978).

mandated by §17508.5 and the goal of ensuring that consumers understand the claimed environmental attributes of products is neither 'tenuous' nor 'speculative.'" Pet. App. 49a; *see, also*, Pet. App. 17a-18a. In sum, the statute directly furthers the governmental interest in ensuring that consumers are accurately informed about the claimed environmental attributes of products *before* they buy them.

The petitioners are wrong when they argue that their Petition should be granted because the Court's decisions in *Cincinnati*, 113 S.Ct. 1505 (1993), *Edenfield*, 113 S.Ct. 1792 (1993) and *Coors*, 115 S.Ct. 1585 (1995), require that a different result be reached than the result reached by the Court of Appeals. Unlike the situation in *Edenfield*, where the Court could find no real harm which the regulation was aimed at alleviating, in the matter *sub judice*, the record makes clear that the harms recited are real. The record contains ample evidence that adoption of definitions for use in advertisements of the four environmental terms advances the state's asserted interests in a direct and material way. The record shows that many of the petitioners themselves, some of their individual members, and other groups as well, called for the adoption of uniform definitions so that advertisers who wanted to engage in environmental advertising would know the "rules of the game." And finally, the record herein is full of evidence which validates the California Legislature's belief that adoption of definitions of the most abused environmental terms would reduce the amount of deceptive advertising which was then occurring.[20/]

---

20. *Ibanez*, 114 S.Ct. 2084, also does not help the petitioners' argument, because there the Court time and again emphasizes that there is nothing in the record to support the need for the regulation which was the basis of the disciplinary action: "We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board

The *Cincinnati* case also is dissimilar from the matter herein. There, the Court noted that denying commercial papers the right to be distributed through newsracks would not advance the City's goal of promoting safety and esthetics because only 62 newsracks out of 1,500-2,000 would be removed. Thus, enforcement of the ordinance was "an impermissible means of responding to the city's admittedly legitimate interests." 113 S.Ct. 1514. The same, however, cannot be said of §17508.5 because it meets the test set forth in *Edenfield* in that the State has:

> "demonstrate[d] that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S.Ct. at 1803.

Likewise, this Court's recent decision in *Coors* does not compel a different result. There the Court held that a ban on labeling alcohol strength on bottles of beer failed to advance the government's interest in preventing strength wars because "of the overall irrationality of the government's regulatory scheme." 115 S.Ct. at 1592. But what was the irrationality? "The failure to prohibit the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government's true aim is to suppress strength wars." *Id.* The Court's continued review of the Federal Alcohol Administration Act showed other aspects of the statute's internal inconsistencies leading the Court to conclude: ". . . the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve

---

relies here." *Id.*, at 2091. The Court of Appeals herein correctly held that the record in support of §17508.5 does not suffer from this infirmity, *see*, *e.g.*, notes 3 and 4, *supra*.

that end [the government's interest is combatting strength wars]. . . . [because] other provisions of the same act directly undermine and counteract its effects." *Id.*, at 1593; brackets added.

Unlike the statute under review in *Coors*, §17508.5 does not suffer from the same infirmities: it deals with all commercial representations regarding a product's environmental attributes whether in advertisements or on labels. Thus, §17508.5 "directly and materially advances its aim"--it requires that environmental claims for consumer products, which use one of the four defined terms will be truthful and meaningful, advancing both California's consumer protection and environmental policy goals.

The legislature gave the four environmental terms meaning and the Court of Appeals correctly ruled that in doing so, §17508.5 effectively advances California's legitimate interests.

3. The Ninth Circuit Correctly Ruled That Section 17508.5 Is Sufficiently Tailored to Its Goal

The Court of Appeals also correctly ruled that §17508.5 is sufficiently tailored to achieve the dual legislative goals of consumer and environmental protection. It accomplishes the first by curtailing deceptive commercial advertising and, thus, protects both the buying public and the scrupulous advertiser of more environmentally benign products. Pet. App. 18a-21a. It accomplishes the second by allowing manufacturers who have made products with enhanced environmental attributes which meet the definitions of the statute to so advertise and legitimately capture the benefits of green labelling. It thus furthers the goals of promoting resource conservation and reducing the burden on brimming landfills. Pet. App. 21a-22a. And

finally, it accomplishes both goals by ensuring that manufacturers and distributors of more environmentally benign products will not have to compete against products which do not have the same environmental attributes, but seek to use the terms of environmental marketing anyway.

In reaching this conclusion, the Ninth Circuit not only correctly analyzed this Court's previous decisions regarding the standards to be applied in determining whether the "fit" between a statute and the legislature's goal is proper, but previewed the Court's recent decision in *Florida Bar*. There, as it had done in *Edge*, the Court restates the "fit" test by reference to *Fox*, indicating that "In *Fox*, we made clear that the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar*, slip op. at 14.

The Court of Appeals correctly found the necessary fit between §17508.5 and the harms the legislature sought to correct, because the teaching of *Florida Bar, Edge*, and *Ohralik*, 436 U.S. at 462, is that "the validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct." *Edge*, 113 S.Ct. at 2705. It seems that, among other reasons, because the regulation in question in the *Coors* case did not bear the proper relationship to the problem the government sought to correct, it was found to be improper.

Since, in *Florida Bar*, and previously in *Edge*, the Court returned to its decision in *Fox*, the petitioners are incorrect in complaining that the Court of Appeals herein was wrong when it relied in its analysis upon *Fox*. In *Florida Bar*, the Court interpreted the holding of *Fox* in the same manner as the Court of Appeals did:

> "'What our decisions require,' instead, 'is a "fit" between the legislature's ends and the means chosen

> to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." *Florida Bar*, slip op. at 14, quoting *Fox*, 492 U.S. at 480.

Thus, so long as the "fit" is "reasonable," the Court will "leave it to government decisionmakers to judge what measure of regulation may best be employed." *Fox*, at 480. The Court of Appeals here, as required by this Court in *Posadas*, 478 U.S. at 341, *Fox*, 492 U.S. at 480, *Edge*, and *Florida Bar* correctly held that §17508.5's manner of regulating the use of certain environmental terms in advertising more than adequately meets the "'fit' between the legislature's ends and the means chosen to accomplish those ends." *Florida Bar*, slip op. at 14.

And the Court in *Edge* reiterated that what it had said in *Fox* is the standard reviewing courts are to apply:

> "Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgment." *Edge*, 113 S.Ct. at 2707.

As shown by this Court's most recent decision in *Florida Bar*, petitioners are also wrong when they claim the *Coors* decision requires a reversal of the Ninth Circuit's decision in this matter. Although in *Coors* the Court recognized the existence of ways less obtrusive than an outright ban on labelling to accomplish the government's goal and therefore found the necessary "fit" missing, it is almost always possible to find less obtrusive means than an outright *ban*. The *Florida Bar* decision at a minimum,

however, reiterates that the existence of other alternatives does not invalidate a legislative choice so long as the legislature's choice, even if it is not the single best choice, is a choice which is "in proportion to the interest served." Slip op. at 14. As the courts below ruled, §17508.5 clearly meets this test.

Section 17508.5 is not a statute which bans speech. Rather it requires that when certain terms are used in advertising the environmental benefits of a consumer product, the consumer product meet minimal standards. This ensures that consumers who want to purchase, or who think they are purchasing, products which either have an environmental benefit or are at least more environmentally benign than other products, will not be fooled. The statute, by defining only the terms of environmental marketing which the record shows caused the public the most confusion and potential for harm, sought to leave other forms of expression open to advertisers. By enacting §17508.5, the legislature sought to prevent advertisements for products which, while they may be literally true, do not provide a meaningful environmental benefit. Thus, manufacturers who have spent money to develop more environmentally benign products, and the public, are protected from damage by those who would improperly use the "buzz" words of environmental marketing. Section 17508.5 merely requires that products which make an environmental claim, provide an environmental benefit. It has done so in a manner which furthers the state's goals of consumer and environmental protection while at the same time not placing a burden on speech which is more extensive than necessary.

The Court of Appeals further reviewed the "alternatives" suggested by petitioners (Petition 22-24) and correctly concluded that the "case-by-case prosecution" approach (which petitioners had previously opposed; Pet.

App. 23a) or adoption of a statute mandating qualifying or explanatory language are not legitimate alternatives because they neither accomplish the legislature's goals nor are they less restrictive or more precise. Pet. App. 23a-24a. For instance, use of California's general false advertising laws to challenge spurious environmental claims

> "require reference to vague, unspecified standards . . . as opposed to section 17508.5's numerically exact thresholds, to ascertain liability. These alternative statutes are *less* precise and, as the district court noted, potentially more inhibiting of truthful environmental representations. *Lungren*, 809 F.Supp. at 759. More over, these statutes promote a narrower range of state interests than section 17508.5, insofar as they fail to create the same incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities." Court of Appeal decision, Pet. App. 23a-24a.

The Court of Appeals concludes its analysis of alternatives to §17508.5 by stating:

> "Here, as discussed above, the linkage between the asserted governmental interest and advertising was equally close, and the restriction less sweeping than that sustained by the Court in *Posadas*. Here, an alternative approach requiring additional speech to illuminate environmental claims was equally close at hand. Yet as the district court observed, these and other potential alternatives--including prescreening, format and content guidelines and added detail--were not clearly less burdensome than adherence to uniform definitions. *Lungren*, 809 F.Supp. at 759. In addition, . . . it is not apparent that use of the

regulated terms with qualifiers would advance California's second asserted interest, environmental protection." Pet. App 24a.

The Ninth Circuit based its conclusion on a proper analysis of this Court's previous decisions and correctly held that the scope of §17508.5 was narrowly tailored to advance *both* of California's interests: consumer protection from deceptive advertisements and environmental protection by ensuring that more environmentally benign products could effectively advertise and "capture the benefits of green labelling." Pet. App. 21a-22a. Thus, §17508.5 is a "reasonable fit" to meet the legislative goals, meets each *Central Hudson* test, is constitutional and no reason exists for this Court to review the Ninth Circuit's decision.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari.

Dated: July 7, 1995

Respectfully submitted,

Daniel E. Lungren, Attorney General
Herschel T. Elkins, Sr. Assistant Attorney General
Susan E. Henrichsen, Deputy Attorney General
Christopher M. Ames, Deputy Attorney General

*Albert Norman Shelden, Supervising
Deputy Attorney General
110 West A Street, Suite 1100
San Diego, California 92101
Telephone: (619) 645-2089

Counsel of Record for Respondent Daniel E. Lungren, Attorney General

APPENDIX

TABLE OF CONTENTS

APPENDIX

Page

California Business and Professions Code § 17508.5 ..... 1Ra

Excerpted pages i-iv from EPA Evaluation of Environmental Marketing Terms in the United States, (EPA 741R-92-003) February 1993 ..... 3Ra

§ 17508.5. Environmental representations relating to consumer goods

It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable," "photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric *ozone* is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product * * * will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every county in California with

a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.45 of the Public Resources Code.[1]

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation. (Added by Stats.1990, c. 1413 (A.B.3994), § 1. Amended by Stats.1991, c. 1091 (A.B.1487), § 11.)

---

1. The portion of the statute defining "recyclable" was held to be unconstitutionally vague by the district court. (57a-59a) The State has not appealed that ruling.

February 1993

EPA 741R-92-003

United States
Environmental Protection
Agency

Office of Pollution Prevention
and Toxics
Washington, D.C. 20460

EPA

EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES

- 4Ra -

EVALUATION OF ENVIRONMENTAL MARKETING TERMS IN THE UNITED STATES

February 5, 1993

Prepared for:

Eun-Sook Goidel
Pollution Prevention Division
Office of Pollution Prevention and Toxics
U.S. Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Prepared by:

Abt Associates
55 Wheeler Street
Cambridge, MA 02138

EPA Contract No. 68-D9-0169

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

1. ISSUES IN ENVIRONMENTAL MARKETING . . . 1
   1.1 BACKGROUND 1
   1.2 INTRODUCTION 2
   References 5

2. CONSUMER PERCEPTION OF ENVIRONMENTAL CLAIMS 7
   2.1 INTRODUCTION 7
   2.2 CONSUMER AWARENESS AND UNDERSTANDING OF ENVIRONMENTAL MARKETING TERMS 8
   2.3 CONSUMER CONFIDENCE IN ENVIRONMENTAL MARKETING CLAIMS 22
   2.4 ENVIRONMENTAL PURCHASING HABITS 24
   2.5 SUMMARY 25
   References 27

3. INVENTORY OF ENVIRONMENTAL LABELING AND MARKETING TERMS. 29
   3.1 INTRODUCTION 29
   3.2 METHODOLOGY. 29
   3.3 RESULTS 34
   3.4 SUMMARY 63
   References 67

4. DISCONTINUATION OR AVOIDANCE OF ENVIRONMENTAL CLAIMS. 69
   4.1 INTRODUCTION 69
   4.2 VOLUNTARY REMOVAL OF ENVIRONMENTAL LABELS. 71

4.3 COMPANIES CHOOSING NOT TO MAKE ENVIRONMENTAL CLAIMS 73
4.4 CLAIMS WITHDRAWN OR MODIFIED AFTER LEGAL CHALLENGE..... 75
4.5 SUMMARY 96
References 98

5. REGULATING ENVIRONMENTAL MARKETING TERMS 101
5.1 INTRODUCTION 101
5.2 DEFINITIONS OF ENVIRONMENTAL MARKETING TERMS..... 113
Contacts 143
References 146

Appendix 1. Category Classifications from **Productscan Search** 157

Appendix 2. List of Proposed Definitions for Environmental Marketing Terms 159

Appendix 3. List of Individuals or Organizations Proposing Definitions for Environmental Marketing Terms 177

Appendix 4. Federal Trade Commission Environmental Marketing Guidelines 181

EXECUTIVE SUMMARY

Since 1989, environmental marketing has emerged as an important issue for consumers, marketers, regulators, and policy makers. Many American consumers, not only the most environmentally conscious, have sought to lessen the environmental impacts of personal purchasing decisions by buying and using products perceived to be less harmful to the environment. Marketers have responded to consumer demand by increasing both environmental marketing claims and new or redesigned "green" consumer products. Policy makers have seen environmental marketing as a means to promote environmental policy goals through market-based incentives.

. . .

This study is a comprehensive examination of the use of environmental marketing terms in the United States as of mid-1992. Topics discussed in the report include: (a) issues involved in the use of environmental marketing terms; (b) consumer understanding of these terms; (c) trends in the use of environmental marketing terms in consumer product labeling and advertising; (d) cases where environmental marketing claims have been avoided or discontinued; and (e) proposed and existing definitions of environmental marketing terms.

This report was prepared in response to a call for federal action by many groups involved in environmental marketing, and is designed to serve two main purposes. For state and federal policy makers seeking to promulgate guidelines or regulations governing environmental marketing terms, it provides an analytical foundation on which to base policy decisions. For those generally interested in environmental marketing, it serves as a comprehensive source of information about the major

issues involved. It does not advocate a particular position or course of action. Many of the trends discussed in this report can serve as a baseline against which comparisons can be made in the future. Much of the research was completed prior to the Federal Trade Commission's issuance of guidelines for environmental marketing. Consequently, while the guidelines are included in this report, no data yet exist with which to measure their effects on the marketplace.

Environmental Marketing Issues[1]

Environmental marketing differs from other forms of advertising in two important ways. First, consumers who buy goods perceived to be less environmentally harmful base their purchasing decisions not only on inherent product characteristics (such as price and apparent quality), but also because they feel that they are "doing good," either by minimizing their own environmental impacts or by promoting environmentally beneficial activities (e.g., closing the recycling loop by buying products with substantial recycled content). Second, environmental marketing provides incentives for manufacturers to make significant environmental improvements by providing a competitive advantage to reduce environmental impacts of product manufacture, use, reuse, and eventual disposal. However, the rapid rise in the use of poorly-defined or ambiguous terms used in environmental marketing has created several marketplace disruptions. These disruptions include consumer confusion, legal and other actions against marketers for deceptive advertising, and attempts by

---

1. The term environmental marketing is used in this paper to mean the voluntary use of environmental claims by marketers. In this context, it does not include third-party certification programs or mandatory negative labeling, such as health hazard warning labels.

several private organizations and government agencies to create standardized definitions and guidelines for the use of the terms that conflict with the FTC guidelines.

Several factors common to environmental attributes exacerbate the confusion over these marketing terms. Environmental claims, such as *ozone-friendly* or *source-reduced*, pertain to characteristics of a product with which a consumer generally has little or no experience or comparative information. Consumers, therefore, cannot evaluate the credibility or value of such claims. In addition, environmental labels often pertain to circumstances over which a marketer has little or no control. For example, the recyclability of a package is thought by many to be dependent upon the availability of the appropriate recycling infrastructure. By promoting a product as *recyclable*, marketers are making a claim over which they have little or no control because they do not provide consumer access to the appropriate recycling infrastructure. Finally, many terms used in environmental labeling are not part of everyday language and are often poorly understood. A lack of common understanding of terms has led to the misperception that environmental claims imply that a product is "good for the environment," even though virtually all consumer products are associated with some adverse environmental impacts. Often possessing a limited understanding of the scientific and policy issues and vocabulary involved, consumers are exceptionally powerless when evaluating environmental claims and are arguably most in need of nationwide, uniform guidance.

Because environmental marketing relates to, and benefits from, consumers' desire to minimize their impacts on the environment, environmental advertising claims must be more than simply truthful in the information they relate. To serve as a policy tool, the claims themselves must

reflect real environmental benefits or policy goals recognized by scientists, policy makers, manufacturers, and society. While regulation of environmental marketing terms alone may not increase the purchase of green products, well-conceived definitions and guidance could ensure that the environmental marketing claims made that influence consumer purchasing decisions are truthful, standardized across products, and non-trivial.

Consumer Understanding and Response

After more than two years of heavy exposure to environmental marketing, recent surveys indicate that American consumers are somewhat skeptical and would support governmental regulation of environmental advertising, but are still generally believing of and responding to environmental marketing claims. However, studies also show that (a) many consumers do not understand the specific environmental labeling terms with which they are confronted, and (b) many consumers often do not act on their own assertion that they would preferentially purchase products that are less damaging to the environment.

Surveys examining consumer awareness and understanding of environmental marketing terms indicate that comprehension varies among terms and for the most part is quite low. The terms most commonly used by marketers, such as *recycled* and *biodegradable*, were also the most widely understood by survey respondents. This suggests that consumers have the capacity to learn about the importance of product attributes if exposed to such information (labeling information in conjunction with other educational efforts) over time.

Evidence exists that a significant number of consumers are skeptical or unsure about the veracity of environmental marketing claims. Although they indicate a willingness to selectively purchase or to pay more for products with real environmental benefits, many consumers do not believe that marketers' environmental marketing claims can be trusted. What consumers appear to be lacking is both an adequate understanding of the meanings of environmental claims, and a means to assessing their veracity and significance. Consumer skepticism might be lessened by a credible source of standardized definitions for environmental terms that consumers knew to be true and non-trivial.

Through their purchasing decisions, consumers give producers marketplace feedback about their personal environmental concerns, thereby creating incentives to make real environmental improvements. Consumer perception and their resulting demand helps to drive the development and improvement of a product's environmental attributes. By providing a common language of terms, highly specific federal guidelines would (a) allow consumers to understand what products offer them, and to provide informed feedback (through their purchasing decisions) to producers; and (b) allow marketers to advertise environmental qualities in ways that are clear to consumers, consumer advocates, and regulators.

Certain other nationwide actions, such as consistent review of claims, enforcement actions where warranted, development of a third-party eco-labeling program, negative labeling of products with hazardous constituents, or other forms of extensive consumer education, have been suggested by some as potential ways to increase consumer awareness of the environmental consequences of their purchasing decisions.

Use of Environmental Marketing Terms

Judging by advertising and trade press coverage, environmental marketing appears to be an important trend to marketers. However, there have been few studies to quantify environmental marketing activity. One measure of activity in this field is the number and type of environmental claims being made for non-durable consumer packaged goods. Research using a database of new grocery store product introductions indicates that the use of environmental marketing claims has indeed increased rapidly in recent years. In 1989, 5.9 percent of new products had environmental claims. This increased to 10.1 percent in 1990 and 12.3 percent in 1991. The first six months of 1992 has shown a slight decline in most types of claims, falling to 11.4 percent of new product introductions.

(3)

No. 94-1930

Supreme Court, U.S.
FILED
JUL 11 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

vs.

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CALIFORNIANS AGAINST WASTE AND THE ENVIRONMENTAL DEFENSE FUND

BARBARA J. OLSHANSKY*
Environmental Defense Fund
257 Park Avenue South
New York, New York 10010
(212) 505-2100

* *Counsel of Record for Respondents Californians Against Waste and the Environmental Defense Fund*

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the First Amendment bars a state from establishing threshold standards for the use of certain terms describing the environmental attributes of consumer goods in advertisements for those goods, in order to curtail deceptive and misleading use of such terms and thereby support waste reduction and resource conservation programs.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, respondents Californians Against Waste and the Environmental Defense Fund inform the Court that they have no parent companies and no subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Statute 2

B. The Opinions of the Courts Below 3

REASONS FOR DENYING THE WRIT 6

I. THE PETITION PRESENTS NO BASIS FOR THIS COURT'S REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS 6

II. THE COURTS BELOW CORRECTLY RULED THAT SECTION 17508.5 CONSTITUTES A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH 8

A. The Ninth Circuit Properly Found That The Statute Directly Advances California's Interests 8

B. The Ninth Circuit Properly Determined That Section 17508.5 Is Sufficiently Tailored to Meet California's Objectives 15

III. SECTION 17508.5 DOES NOT DISTINGUISH AMONG SPEAKERS ON THE BASIS OF VIEWPOINT 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

American Frozen Food Institute v. Mathews, 413 F. Supp. 548 (D.D.C. 1976), *aff'd*, 555 F.2d 1059 (D.C. Cir. 1977) 22

Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469 (1989) 4, 15, 16, 17, 19

Bristol-Myers Co. v. F.T.C., 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 22

Burson v. Freeman, 504 U.S. 191 (1992) 15

Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557 (1980) 4, 5, 8, 9, 14, 17, 22

Edenfield v. Fane, 113 S. Ct. 1792 (1993) 15

Florida Bar v. Went for It, Inc., 63 U.S.L.W. 4644 (U.S. June 21, 1995) 8, 15, 16, 19

Ibanez v. Florida Dept. of Business & Professional Regulation, 114 S. Ct. 2084 (1994) 15

Kraft, Inc. v. F.T.C., 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1284 (1993) 22

New State Ice Co. v. Liebmann, 285 U.S. 262 (1931) 23

Page

Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 19

R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992) 20, 21

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995) 15

Constitutional Provisions

U.S. Const. Amend. I ..... *passim*

U.S. Const. Amend. XIV 2

Statutes

Cal. Bus. & Prof. Code, Section 17508.5 (West Supp. 1995) ..... *passim*

Cal. Pub. Res. Code § 40000 (Deerings 1995) 14

Cal. Pub. Res. Code § 41780(a)(2) (Deerings 1995) 14

21 U.S.C. § 343 (1992) 21

Rules

Federal Rule of Civil Procedure 24(a) 3

Other Authorities

American Enviro Products, Inc., F.T.C. No. C-3376 (March 18, 1992) 13

Page

Archer Daniels Midland Company, F.T.C. No. C-3492 (April 12, 1994) 13

Ex-Cell-O Corp., 82 F.T.C. 36 (1973) 13

G.C. Thorsen, Inc., F.T.C. No. C-3467 (October 8, 1993) ... 13

Jerome Russell Cosmetics, USA, Inc., F.T.C. No. C-3341 (August 21, 1991) 13

21 C.F.R. § 101 (1994) 21

21 C.F.R. § 101.13 (1994) 21

21 C.F.R. § 101.56 (1994) 21

United States Environmental Protection Agency, "Evaluation of Environmental Marketing Terms in the United States (1993) 13

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

- v. -

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS CALIFORNIANS AGAINST WASTE AND THE ENVIRONMENTAL DEFENSE FUND

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the First Amendment and the Fourteenth Amendment, Section 1, to the United States Constitution and of California Business and Professions Code Section 17508.5 (West Supp. 1995) are set forth in the Appendix to this brief and are listed in the Table of Contents thereto. *See* Res. App., *infra*, 1a-3a.

STATEMENT OF THE CASE

A. The Statute

Section 17508.5 of the California Business and Professions Code establishes objective standards for four environmental terms commonly used in consumer product advertisements: "recycled," "biodegradable," "photodegradable," and "ozone-friendly."[1] The statutory standards apply only to representations in product advertising or on labels made by manufacturers and distributors regarding the environmental attributes of their consumer products.

The definitions established by Section 17508.5 embody minimum qualitative and quantitative standards. Under the statute, a manufacturer wishing to advertise its product as "recycled" must ensure that the product contains at least 10 percent postconsumer content. CAL. BUS. & PROF. CODE § 17508.5(e); Res. App. 3a. Products may be labeled as "ozone-friendly" only if they do not contain any chemicals

---

[1] Respondents have not appealed the district court's ruling that the definition of the fifth term covered by Section 17508.5 -- "recyclable" -- was unconstitutionally vague. Accordingly, this brief will address the scope of the statute as upheld by the courts below.

which migrate to the stratosphere and cause an accelerated depletion of ozone. § 17508.5(a); Res. App. 2a. In order to tout a product as "biodegradable," the manufacturer must ensure that the product will "decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide." § 17508.5(b); Res. App. 2a. A similar definition is delineated for the term "photodegradable"; the product must "decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide." § 17508.5(c); Res. App. 2a.

B. The Opinions of the Courts Below

In February 1992, petitioners, a consortium of trade, manufacturing, and advertising associations, filed a complaint in federal district court seeking to overturn Section 17508.5. They contended, *inter alia*, that Section 17508.5 violated, on its face, their First Amendment right to free speech.[2] The complaint named respondent Daniel Lungren, the Attorney General of California, as the defendant. Respondents Californians Against Waste and the Environmental Defense Fund intervened as defendants in the district court action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

The district court rejected petitioners' First Amendment claim in denying their motion for summary judgment. Pet. App. 34a-59a. The court concluded that Section 17508.5

---

[2] Petitioners also argued below that Section 17508.5 was unconstitutionally vague. With one exception, (*see* note 1, *supra*), the lower courts rejected petitioners' contention. They no longer independently press their remaining vagueness claims in this Court.

regulates only representations made in the commercial context and therefore does not, contrary to petitioners' claim, restrict noncommercial messages. Pet. App. 43a-44a. Nothing in the statute, the district court held, restricts in any way petitioners' right to publish editorial or informational advertisements regarding any environmental issue related to the statutory terms. *Id.* at 43a. "[T]he statute only applies to representations that a specific consumer good possesses a particular environmental attribute." *Id.* at 40a.

Applying this Court's analysis in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980), the district court further ruled that Section 17508.5 did not amount to an impermissible limitation on commercial speech. According to the court, the State properly asserted a "substantial state interest" in support of Section 17508.5, (Pet. App. 48a), the challenged restriction on commercial speech "directly and materially" advanced that substantial state interest, (Pet. App. 48a-49a), and the state law was "a means narrowly tailored to achieve the desired objective." Pet. App. 50a-53a, *quoting Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989).

The court of appeals affirmed. Pet. App. 1a-27a.[3] The court concurred with the district court's finding that Section 17508.5 evinced "the California legislature's intent to regulate misrepresentations made in a commercial context exclusively." Pet. App. 11a. The appellate court also upheld the district court's determination that Section 17508.5 survived *Central Hudson* First Amendment scrutiny. Pet. App. 13a-25a. The court rejected petitioners' claim that the record did not support the district court's ruling that the law was "directly and materially" related to the State's

---

[3] Judge Noonan dissented. Pet. App. 28a-33a.

"substantial interests" in protecting consumers from deceptive environmental advertising and conserving natural resources. Pet. App. 18a-22a. The court of appeals found that "the record contains abundant support for the proposition that green marketing boosts consumer demand for the allegedly recycled or biodegradable product," that "most consumers who purchase environmentally-oriented products discovered their alleged ecological attributes from packaging labels," and, that in the absence of Section 17508.5, there had been "numerous instances of advertisers making marketing claims containing misleading or inconsistent uses of the terms regulated by section 17508.5." Pet. App. 17a.

The court determined that Section 17508.5 materially furthers the State's articulated interests in several ways. First, by delineating "objective, and consistently applied standards," it increases the accuracy of claims using the statutory terms, thereby enabling consumers to make more deliberate and informed choices. Pet. App. 18a-19a. Second, the statute's minimum standards permit consumers to select products that provide significant environmental benefits. Pet. App. 18a. Third, the statute reduces the unfair competition resulting from deceptive advertising practices by ensuring that manufacturers making environmental improvements in their products can effectively advertise and "capture the benefits of green labelling." Pet. App. 21a.

Finally, the court of appeals held that Section 17508.5 satisfied *Central Hudson's* requirement that the restriction on commercial speech be "no more extensive than necessary to further the state's interests." Pet. App. 22a, *quoting* 447 U.S. at 569-70. Neither of petitioners' proffered regulatory alternatives, the court concluded, supported their claim that the state law was unduly restrictive. Pet. App. 22a-25a.

REASONS FOR DENYING THE WRIT

I. THE PETITION PRESENTS NO BASIS FOR THIS COURT'S REVIEW OF THE JUDGMENT OF THE COURT OF APPEALS

Respondents Californians Against Waste and the Environmental Defense Fund respectfully urge this Court to deny the Petition for a Writ of Certiorari because this case presents none of the features found in cases warranting this Court's review.

The Ninth Circuit Court of Appeals correctly rejected petitioners' First Amendment challenge to Section 17508.5, and that ruling presents nothing more than a factbound application of this Court's First Amendment precedent regarding state regulation of purely commercial speech. The case raises no fundamental issue regarding the proper First Amendment test to apply to restrictions on consumer product advertising. Nor does the petition present any threshold dispute regarding the commercial nature of the speech that is regulated by California's truth-in-environmental advertising law.

Further, this case does not present a conflict among the circuits mandating a definitive ruling by this Court. No lower court has ruled to the contrary on the narrow issue addressed here, the assessment of a state regulation which establishes standard definitions for technical terms used in consumer product advertising in order to curtail deceptive and misleading claims of environmental benefit.

The absence of any other case law counsels strongly against this Court granting certiorari for another reason as well. States are just now beginning to consider legislative measures, like the state law challenged in this case, designed

to promote environmental protection goals through market forces rather than the kind of command and control regulatory approach that has dominated federal and state environmental laws during the past two decades. With other states poised to decide what form of regulation to adopt to address the same problems as those plaguing California, review by this Court now would be premature.

The California legislature carefully crafted Section 17508.5 to help stem the rising tide of deceptive and misleading environmental advertising claims and to support the State's waste management and resource conservation programs. The law thus represents California's reasoned determination regarding the most appropriate means of addressing the consumer and environmental protection problems currently facing the State and its residents. As the court of appeals appropriately noted, this Court's precedent stresses the need for deference to such determinations. Pet. App. 25a. No risk is created here by such deference because "the California legislature has stayed within constitutional parameters." *Id.* Section 17508.5 imposes a very limited restriction on commercial speech, and has been narrowly tailored to directly and materially advance the State's articulated goals.

In sum, petitioners' challenge presents none of the indicia found in cases warranting a grant of certiorari. Accordingly, the petition should be denied.

II. THE COURTS BELOW CORRECTLY RULED THAT SECTION 17508.5 CONSTITUTES A PERMISSIBLE REGULATION OF COMMERCIAL SPEECH

A. The Ninth Circuit Properly Found That The Statute Directly Advances California's Interests

The court of appeals correctly rejected petitioners' claim that California's environmental advertising law, which regulates the use of certain terms purporting to describe the environmental attributes of consumer goods, violates the First Amendment. The court based its ruling on a straightforward application of this Court's commercial speech precedent, in particular, the analytic framework the Court first set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) and most recently applied in *Florida Bar v. Went for It, Inc.*, 63 U.S.L.W. 4644, (U.S. June 21, 1995).[4] Petitioners argue, however, that the lower courts misapplied the last two prongs of the *Central Hudson*

---

[4] Petitioners no longer dispute the threshold applicability of the *Central Hudson* framework. In the lower courts, petitioners argued that the state law should be subject to strict scrutiny because it restricted noncommercial speech. The lower courts uniformly rejected that contention, which was based on petitioners' misconstruction of the scope of the state law. *See* Pet. App. 8a-13a, 38a-44a. Petitioners have (wisely) abandoned that claim before this Court. The lower courts, however, also rejected the argument of respondents Californians Against Waste and the Environmental Defense Fund that the kind of commercial speech restricted by Section 17508.5 is "inherently misleading" and therefore not entitled to First Amendment protection at all. *See* Pet. App. 14a-15a, 45a-47a. Should this Court, contrary to respondents' submission, grant the petition in this case, the inherently misleading nature of the speech at issue would provide an alternative basis for affirming the judgment below.

test to the facts of this case.[5] None of their claims possesses merit.

Petitioners' assertion, (Pet. 18), that the statute cannot survive scrutiny because it "is irrational and does not directly advance California's interests to a material degree," is singularly unconvincing. The immediate and material relationship between the State's interests in preventing deceptive environmental advertising and supporting resource conservation efforts and an advertising law that allows consumers to make informed choices about goods based on their environmental attributes, cannot be disputed. By establishing definitional standards for a few select environmental terms, Section 17508.5 provides manufacturers with an economic incentive to make environmental improvements in their products in order to meet the standards if they wish to take advantage of the shorthand informational value of a particular environmental term of art. Pet. App. 21a. This incentive directly furthers California's interest in promoting resource conservation. When manufacturers change their products to meet the statutory standards, the improvements directly accomplish the State's objectives of reducing waste, conserving resources, and bolstering recycling programs. *See Id.*

The statute also provides consumers with more accurate and reliable information regarding their market choices by eliminating the potential for the multiplicity of meanings that has bewildered and misled consumers for years. As the court of appeals appropriately concluded, by eliminating

---

[5]The last two prongs of the *Central Hudson* framework inquire whether the restriction on commercial speech directly advances the substantial state interest asserted, and whether the regulation is more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

inconsistent usage of the covered terms, Section 17508.5 enables consumers to rely reasonably on the accuracy of environmental claims, and "thus make rational product comparisons." Pet. App. 19a. Moreover, the minimum standards embodied in the statutory definitions ensures consumers that products advertised by the defined terms will actually provide real and *significant* environmental benefits. Pet. App. 18a.

Petitioners' insistence that California's law is nonetheless irrational turns this Court's First Amendment precedent on its head. They argue, (Pet. 18-19), that Section 17508.5 is infirm because it bars only those advertisements designed to sell a particular consumer good and not all informational messages that contain generalized descriptions of environmental attributes. The State, however, has done nothing more than exempt from the law's prohibition those expressions of commercial speech that are both more removed from the consumer's immediate purchasing decision and more likely to be commingled with noncommercial messages.[6] Such a state effort to mitigate the effects of the

---

[6] Petitioners argue, (Pet. 19), that the statute is ineffective because, as interpreted by the lower courts, it permits advertisers "to use the regulated terms to say whatever they wish so long as their statements are phrased 'generally' enough." The lower court's opinion, however, contains no such conclusion. For instance, the district court's decision that the statute did not reach the Del Monte Food Company's informational messages regarding the "recyclability" of steel was based squarely upon the statutory language, which plainly limits the statute's coverage to representations about the environmental attributes of *consumer products*. *See* Pet. App. 39a-40a & n.6. As the district court correctly noted, Del Monte's "tin" can message does not constitute a representation concerning the environmental attributes of a particular consumer product and therefore simply does not fall within the ambit of the statute. *Id.*

advertising restriction, by narrowing the law's applicability, does not create a constitutional infirmity. It instead underscores the reasonableness of the law.

Petitioners, in effect, invite this Court to create a constitutional Catch 22. They argued below that the state law was unconstitutional because (they claimed) it prohibited general informational messages that had noncommercial elements. Pet. App. 8a-13a, 38a-44a. But, now that the lower courts have concluded that the law includes no such restriction, petitioners argue here, (Pet. 19), that it violates the First Amendment because it does *not* prohibit those general informational messages. This new twist in petitioners' argument may be interesting, but it is certainly no more persuasive than the argument made to the courts below.

Petitioners' argument that Section 17508.5 fails to advance the State's interests because it does not cover every term that might be used in claims of environmental benefit is similarly unpersuasive. The statute was not enacted as a measure to police every environmental attribute claim; it was intended to regulate several of the terms most commonly abused in environmental advertising. In the absence of uniform definitions, these four terms are merely technical buzzwords, phrases whose meanings are elusive but which the public nevertheless has come to associate in imprecise ways with sound environmental practice. By imbuing these terms with specific meanings and delineating standards for their use, Section 17508.5 clarifies the specific shorthand through which advertisers in the past have conveyed an unlimited number of vague, misleading, and deceptive environmental messages to the public.

Finally, there is no merit to petitioners' claim, (Pet. 20-21), that the State has not met its affirmative burden of showing the direct and material relationship between the

challenged law and the State's substantial interests in consumer protection and environmental conservation. The "entire factual basis" for Section 17508.5 is not, contrary to petitioners' intimation, "'only one instance of one word, cited by a partisan of the statute and unproved in court.'" Pet. 20, *quoting* Pet. App. 30a (Noonan, J., dissenting). Petitioners' claim grossly mischaracterizes the record in this case.

As the court of appeals expressly noted, (Pet. App. 17a-18a), the record is replete with evidence supporting the State's conclusions regarding the existence of, and continuing potential for, deceptive and misleading use of the statutory terms to tout trivial or nonexistent environmental benefits of consumer products. The record offers an extensive and well-documented history of advertisers' inconsistent and misleading use of the very environmental terms covered by Section 17508.5. The record includes, for example, a lengthy report on deceptive environmental advertising issued by a ten-state task force of state attorneys general, (SER 12-83),[7] as well as numerous affidavits, studies, letters, and articles.[8]

---

[7] "SER" refers to respondents' Supplemental Excerpts of Record filed in the court of appeals; "ER" refers to petitioners' Excerpts of Record filed with that court.

[8] *See, e.g.*, SER 84-87 (letter from the Procter & Gamble Company, one of petitioners' members, to the Minnesota Attorney General describing the misleading aspects of biodegradability claims); SER 156-62 (an affidavit from an environmental consulting firm attesting both to the misleading use of the covered terms in California and to consumers' confusion over their meaning); SER 193-204 (a national study completed by Abt Associates Inc., a research and consulting firm, finding that consumers are misinformed about products' environmental attributes due to inconsistent labeling); SER 88-89 (a letter from the California Attorney General to the Governor of California specifying the nature and extent of deceptive environmental

The record also well documents both the substantial consumer interest in purchasing goods that offer the kinds of environmental attributes covered by Section 17508.5, (SER 18-19, 196, 209, 275), and consumers' special needs for guidance because of their inability to evaluate a product's environmental attributes on their own (SER 20, 88, 136-37, 195, 199, 216, 276). Indeed, petitioners' claim regarding the inadequacy of a factual basis for the law is difficult to fathom in light of their own repeated acknowledgement in testimony before government agencies and in the petition itself, (*see* Pet. 17 n.11), of the potential for advertisers to use the

---

advertising). For additional record support, *see* SER 21-22, 60, 92, 158, 227-228; *see also Ex-Cell-O Corp.*, 82 F.T.C. 36 (1973) (order enjoining company from making biodegradability claims regarding plastic-lined milk cartons); *Jerome Russell Cosmetics, USA, Inc.*, F.T.C. No. C-3341 (August 21, 1991) (final consent order enjoining company from representing that its hair spray, which contained ozone depleting chemicals, was "ozone-safe"); *American Enviro Products, Inc.*, F.T.C. No. C-3376 (March 18, 1992) (final consent order enjoining company from making biodegradability claims regarding its disposable diapers); *G.C. Thorsen, Inc.*, F.T.C. No. C-3467 (October 8, 1993) (final consent order enjoining company from representing that its aerosol cleaning products, which contained ozone depleting chemicals, are "ozone friendly"); *Archer Daniels Midland Company*, F.T.C. No. C-3492 (April 12, 1994) (final consent order enjoining company from making biodegradability and landfill benefit claims for plastic products containing a corn starch additive); United States Environmental Protection Agency, "Evaluation of Environmental Marketing Terms in the United States" (1993) (detailing 35 cases brought by state Attorneys General and local Departments of Consumer Affairs against manufacturers for advertising claims that used the terms "degradable," "recycled," and "ozone-friendly" in a deceptive and misleading manner).

environmental terms covered by Section 17508.5 in misleading ways.[9]

Further, the record amply supports the State's conclusion regarding the critical need for waste reduction and resource conservation measures in California. CAL. PUB. RES. CODE § 40000 (Deerings 1995); *see* SER 124-25, 138. Recycling programs are a vital part of the State's effort to reduce the amount of municipal waste that is currently being sent to landfills and incinerators for disposal. *See* CAL. PUB. RES. CODE § 41780(a)(2) (Deerings 1995); SER 125, 148, 158-61. However, as the record shows, markets for the materials collected in such programs have not been adequately developed, and therefore such recovered materials are not diverted from the solid waste stream destined for landfilling or incineration. SER 152, 155. The enhancement of these markets constitutes a critical part of the State's effort to reduce waste, and conserve its dwindling landfill space.

Such a record is more than sufficient under *Central Hudson* and its progeny. This Court's precedent does not

---

[9] For example, petitioner American Forest & Paper Association (formerly The American Paper Institute) stated in its comments on the findings and recommendations of the ten-state attorney general task force on deceptive advertising that:

> [The Association] believes that some form of standardized definitions and guidelines should be developed to *provide meaning* to environmental terms used in product advertising and labeling . . . we believe there is, in all probability, a strong government role required.

SER 7 (emphasis supplied). Other trade associations have voiced similar views. *See e.g.*, ER 70-72.

require "empirical data . . . accompanied by a surfeit of background information." *Florida Bar*, 63 U.S.L.W. at 4647. It is even "sufficient to rely on studies and anecdotes pertaining to different locales altogether." *Id.* Even "simple common sense" can suffice. *Id.*, *quoting Burson v. Freeman*, 504 U.S. 191, 211 (1992). Here, the statute is supported by a host of detailed studies, expert testimony presented to the U.S. Senate and the U.S. Environmental Protection Agency, significant anecdotal evidence, as well as the common sense notion that standardization of a few select terms in consumer advertising promotes consumer understanding and the ability to choose products that meet the required environmental criteria.[10]

B. The Ninth Circuit Properly Determined That Section 17508.5 Is Sufficiently Tailored To Meet California's Objectives

In *Florida Bar*, this Court most recently confirmed that the *Fox* test remains the proper gauge for evaluating the "fit"

---

[10] Petitioners' reliance, (Pet. 18-22), therefore on cases like *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), *Ibanez v. Florida Dept. of Business & Professional Regulation*, 114 S. Ct. 2084 (1994), and *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) is entirely misplaced. The constitutional infirmity in *Coors Brewing Co.* was the law's utterly irrational failure to restrict categories of commercial speech that were more likely to cause harm than the speech the law instead restricted, as well as the law's bizarre requiring of speech that would undermine the restriction's purported purpose. *See* 115 S. Ct. at 1593 ("irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve that end.") No comparable defect infects Section 17508.5. And in both *Edenfield* and *Ibanez*, unlike this case, "the State offered no evidence or anecdotes in support of its restriction...." *Florida Bar*, 63 U.S.L.W. at 4647; *see Ibanez*, 114 S. Ct. at 2090.

between a statute and a state's articulated interests:

> In *Fox*, we made clear that the "least restrictive means" test has no role in the commercial speech context. "What our decisions require," instead, "is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,' a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective."

Florida Bar, 63 U.S.L.W. at 4648 (quoting *Fox*, 492 U.S. at 480) (citations omitted). Thus, contrary to petitioners' contention (Pet. 22-23), the court of appeals appropriately relied on *Fox* in reaching its determination that Section 17508.5 is sufficiently tailored to achieve California's consumer protection and environmental conservation goals.

Petitioners here reiterate their claim that there is "no reasonable fit between the statute's means and its asserted ends." Pet. 22. The primary support for this claim is their assertion that the State could have instead served all of the same interests with a law that did not restrict the use of the four environmental terms of art, so long as they were accompanied by qualifying language that explained what the advertiser meant in each specific context. Petitioners further contend that respondent California conceded as much when it acknowledged before the district court that the statute could be so construed. Petitioners' logic is doubly flawed.

First, although the State did contend before the district court that the law could be validly construed to exempt from

its restriction use of the covered terms with qualifying language, the State never stated that such a construction: (1) was *compelled* by the First Amendment; (2) would serve *all* of the same interests as a state advertising regulation lacking such an exemption; and (3) would serve all of the same interests *to the same degree* as a state law without such an exemption. It is certainly a novel theory of First Amendment law to suggest, as petitioners do, that, if a state says that a state law may possibly be read to cover less speech, that is tantamount to a concession that the law would, absent such a construction, violate the First Amendment. Not surprisingly, petitioners do not cite to any case in support of that novel proposition.

Nor, in any event, does the absence of such a statutory exemption cause the law to violate the tenets of *Central Hudson*. The First Amendment does not create a constitutional straitjacket mandating that states opt in favor of requiring more speech rather than restricting some speech. *See Fox*, 492 U.S. at 479. Moreover, as the court of appeals explained, requiring more speech is "not clearly less burdensome than adherence to uniform definitions." Pet. App. 24a.

Petitioners' second "alternative," case-by-case prosecution under the State's general prohibition on false and misleading advertising, is similarly flawed. Such an approach, the court of appeals found, is both "less precise" and "potentially more inhibiting" than Section 17508.5 because the State's general false advertising statutes employ vague standards that provide little guidance to advertisers in comparison to "section 17508.5's numerically exact thresholds." Pet. App. 23a.

Furthermore, neither of the two proffered "alternatives" would have furthered the State's important environmental

objectives. Pet. App. 23a-24a. As the court noted, regulations that rely on disclaimers or qualifying language cannot help to advance California's environmental conservation goals, because they "fail to create the same incentives for environmentally substandard firms to improve the ecological attributes of their products rather than merely harmonize their claims with production and disposal realities."[11] *Id.*

Finally, petitioners also cryptically refer, (Pet. 24), to the possibility of the State's "directly requiring more environmentally sound packaging." This regulatory approach would not address the problem of deceptive advertising using the covered terms. Moreover, such an approach would eliminate both manufacturer and consumer choice and would therefore be much more intrusive in the marketplace.

In sharp contrast, the burden Section 17508.5 imposes is minimal. Under Section 17508.5, the factual information associated with the four technical terms covered by the statute may be communicated freely and explicitly to the public. Advertisers remain free to inform the public through any medium they choose that their products "contain x percent recovered material" or that their products "will decompose in two years under x conditions." *See* Pet. App. 25a. Section 17508.5 simply prevents petitioners from trading on the reservoir of goodwill created by those manufacturers that have made significant environmental improvements in their products and have used the covered terms to advertise those improvements.

---

[11]There is also plainly a cost to exempting advertisements with qualifying language. As such qualifications persist, the informational significance of the term of art, standing alone, necessarily diminishes.

To be sure, as the court of appeals explained, (Pet. App. 25a), there is "inevitably a degree of arbitrariness in the legislative determination of where along the continuum of recycled content percentages or decomposition timetables a product becomes 'recycled' or 'biodegradable." But, as described by the court below, this Court's precedent, especially, *Fox* and *Posadas De Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), "leave scant judicial latitude to disturb such legislative determinations where, as here, the thresholds drawn do not appear unduly prohibitive and leave considerable room for both more privileged editorial commentary and, in the commercial context, alternative expressions conveying perfectly well information about the modest environmental attributes of products not measuring up" to the standards of the statute. Pet. App. 25a; *see Florida Bar*, 63 U.S.L.W. at 4648 (fit between legislative ends and means need only be "reasonable" and neither "necessarily perfect" nor "necessarily the single best disposition").

III. SECTION 17508.5 DOES NOT DISTINGUISH AMONG SPEAKERS ON THE BASIS OF VIEWPOINT

Having failed before the lower courts to overturn Section 17508.5 on the ground that it unconstitutionally infringes upon their "noncommercial" expression, petitioners now contend, (Pet. 25-27), that the statute violates the First Amendment because it discriminates among speakers on the basis of viewpoint. Unfortunately, this last ditch effort is also unavailing. Neither the statutory language nor the decisional authority support petitioners' theory. No such discrimination exists.

Section 17508.5 in no manner distinguishes between "for profit" and "not-for-profit" speakers. The statute

provides that "it is unlawful for *any person*" to advertise the environmental attributes of their consumer products using the covered terms unless those products meet the definitional requirements. The phrase "any person" makes clear that the statute applies equally to "for profit" and "not-for-profit" sellers that make claims regarding the environmental benefits of their consumer products. Hence, under the statute's plain terms, the same definitional requirements would apply to a "recycled" content claim made by Weyerhauser about one of its paper products, as to a similar claim made by respondent Environmental Defense Fund about its wildlife calendars.

For similar reasons, petitioners' contrasting, (Pet. 26), of the effect of the statutory standards on a manufacturer's use of the covered terms in consumer product advertising with an environmental organization's use of the terms in a discussion of public policy is wholly unavailing. The appropriate comparison is the effect of the statute on an environmental organization's use of the relevant terms in a discussion of public policy with the effect of the statute on any of petitioners' efforts to use those same terms in their own discussion of public policies. And what such a comparison demonstrates is the absence of any viewpoint discrimination; Section 17508.5 imposes absolutely no restriction on either speaker's noncommercial messages, regardless of the viewpoints being expressed. As the court of appeals explained, "a firm can editorialize about the environment, lambast the statute or laud recycling without advertising or otherwise making commercial representations about one of its products." Pet. App. 12a.

Petitioners' reliance, (Pet. 25-27), on this Court's ruling in *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), to support their theory is misguided. Not only did that law restrict noncommercial speech, but it decidedly favored one set of speakers over another: "those arguing in favor of racial,

color, etc. tolerance and equality" over those expressing the opposing point of view. *Id.* at 2548.

Petitioners acknowledge, by omission, that the lower court's ruling does not conflict with the decision of any other court of appeals. Indeed, this case represents the first challenge to a state's effort to establish threshold standards for terms used in the environmental marketing of consumer products.

To be sure, federal and state governments have long imposed analogous restrictions on advertisers. Nutritional claims, for example, present the same concerns as those raised by environmental marketing claims: the complex technical and scientific issues underlying these types of claims greatly limit the ability of consumers to assess their accuracy and significance. For this reason, the federal government has adopted numerous regulations that establish standards for the use of terms describing a product's nutritional attributes. *See* Federal Food, Drug and Cosmetic Act, as amended by the Nutrition Labeling and Education Act of 1990, 21 U.S.C. § 343 (1992); 21 C.F.R. § 101 (1994).[12]

---

[12] The Nutrition Labeling and Education Act and implementing regulations require manufacturers that make nutritional claims about food products to meet strict definitional standards. The definitions set by the Food and Drug Administration pursuant to the Act set baseline requirements, and specify content, ingredient percentages, and measuring techniques for certain key descriptive phrases. For example, the term "sodium free" may only be used in the labeling of food that contains "less than 5 milligrams of sodium per serving" and the term "low sodium" may only be used in reference to food that contain "140 milligrams of less of sodium per serving." 21 C.F.R. § 101.13 (1994). Similarly, "light" or "lite" claims can only be used to advertise a product if the food "derives less than 50 percent of its calories from fat." 21 C.F.R. § 101.56 (1994).

The lower courts have uniformly upheld those regulations against First Amendment challenges.[13] Hence, to the extent that there is any relevant lower court precedent, it is consistent with the court of appeals decision in this case and provides no basis for this Court's review.

Stripped of its exaggerated rhetoric, therefore, the petition merely presents a factbound application of *Central Hudson* in the first challenge to a state restriction on environmental advertising; a challenge brought at a time when, as petitioners acknowledge, there is only a "paucity of newly introduced state environmental laws." Pet. 14.

This fact points to another weighty reason why this Court should be especially wary of subjecting the state law at issue in this case to premature Supreme Court review. States are just now beginning to experiment with the possibility of enacting these kinds of free market environmental laws.[14]

---

[13] *See, e.g., Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 324-26 (7th Cir. 1992) (upholding Federal Trade Commission ban on deceptive claims about the calcium content of processed cheese products), *cert. denied*, 113 S. Ct. 1284 (1993); *Bristol-Myers Co. v. F.T.C.*, 738 F.2d 554, 562 (2d Cir. 1984) (sustaining FTC prohibition against certain advertising claims for analgesics), *cert. denied*, 469 U.S. 1189 (1985); *United States v. General Nutrition, Inc.*, 638 F.Supp. 556, 562 (W.D.N.Y. 1986) (upholding Food and Drug Administration prohibition of certain types of nutritional claims on product labels); *American Frozen Food Institute v. Mathews*, 413 F. Supp, 548 (D.D.C. 1976) *aff'd*, 555 F.2d 1059 (D.C. Cir. 1977) (court upheld FDA regulations requiring certain foods to meet specific quality standards before using certain terminology on the label).

[14] Indeed, even in California, there is continuing debate about the appropriate form environmental advertising regulations should take. On May 23, 1995, the California State Senate passed SB

The states should be encouraged to do so because of the clear value of such experimentation. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Dated: New York, New York
July 11, 1995

Respectfully submitted,

Barbara J. Olshansky*
Environmental Defense Fund
257 Park Avenue South
New York, New York 10010
Telephone: (212) 505-2100

**Counsel of Record for Respondents Californians Against Waste and the Environmental Defense Fund*

426, a bill that would repeal Section 17508.5 and replace it with regulations that incorporate the Federal Trade Commission Guides for the Use of Environmental Marketing Claims.

APPENDIX

TABLE OF CONTENTS

APPENDIX

Page

United States Constitution, Amendment I 1a

United States Constitution, Amendment XIV, Section 1 .. 1a

California Business and Professions Code, § 17508.5 (West 1995) 1a

United States Constitution

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV, Section 1

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

California Business and Professions Code

> **§ 17508.5 Environmental representations relating to consumer goods**
>
> It is unlawful for any person to represent that any consumer good which it manufactures or distributes is "ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, "biodegradable,"

"photodegradable," "recyclable," or "recycled" unless that consumer good meets the definitions contained in this section, or meets definitions established in trade rules adopted by the Federal Trade Commission. For the purposes of this section, the following words have the following meanings:

(a) "Ozone friendly," or any like term which connotes that stratospheric ozone is not being depleted, means that any chemical or material released into the environment as a result of the use or production of a product, will not migrate to the stratosphere and cause unnatural and accelerated deterioration of ozone.

(b) "Biodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through natural biological processes into nontoxic carbonaceous soil, water, or carbon dioxide.

(c) "Photodegradable" means that a material has the proven capability to decompose in the most common environment where the material is disposed within one year through physical processes, such as exposure to heat and light, into nontoxic carbonaceous soil, water, or carbon dioxide.

(d) "Recyclable" means that an article can be conveniently recycled, as defined in Section 40180 of the Public Resources Code, in every

county in California with a population over 300,000 persons. For the purposes of this subdivision, "conveniently recycled" shall not mean that a consumer good may be recycled in a convenience zone as defined in Section 14509.4 of the Public Resources Code.

(e) "Recycled" means that an article's contents contain at least 10 percent, by weight, postconsumer material, as defined in subdivision (b) of Section 12200 of the Public Contract Code.

(f) "Consumer Good" means any article which is used or bought for use primarily for personal, family, or household purposes.

(g) For the purposes of this section, a wholesaler or retailer who does not initiate a representation by advertising or by placing the representation on a package shall not be deemed to have made the representation.

No. 94-1930

(4)

Supreme Court, U.S.
FILED
JUL 21 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000

* *Counsel of Record for Petitioners*

Of Counsel:

Susan Buckley
Katherine B. Harrison
Jonathan Donnellan
Cahill Gordon & Reindel
(a partnership including a professional corporation)

July 21, 1995

BEST AVAILABLE COPY

14pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

A. The Inconsistency of the California Statute with *Central Hudson* 4

B. The Inconsistency of the California Statute with *R.A.V.* v. *City of St. Paul* 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases PAGE

American Frozen Food Institute v. *Mathews*, 413 F. Supp. 548 (D.D.C. 1976), *aff'd per curiam*, 555 F.2d 1059 (D.C. Cir. 1977) 3-4n

Board of Trustees v. *Fox*, 492 U.S. 469 (1989) 6

Bristol-Myers Co. v. *FTC*, 738 F.2d 554 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) 3-4n

Central Hudson Gas & Electric Corp. v. *Public Service Commission*, 447 U.S. 557 (1980) 4, 6, 8

Cincinnati v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) 5-8

Florida Bar v. *Went For It, Inc.*, 63 U.S.L.W. 4644 (U.S. June 21, 1995) 8

Kraft, Inc. v. *FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) 3-4n

Peel v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990) 3

R.A.V. v. *City of St. Paul*, 112 S. Ct. 2538 (1992) 10

Rubin v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995) .. 4, 5, 8

United States v. *General Nutrition, Inc.*, 638 F. Supp. 556 (W.D.N.Y. 1986) 3-4n

Administrative Materials

EPA, *Evaluation of Environmental Marketing Terms in the United States* EPA 741R-92-003 (Feb. 1993) 2, 3n, 8

PAGE

FTC Guides for the Use of Environmental Marketing Claims, 16 C.F.R. Part 260 (1995) 7

Constitutional Provisions

U.S. Const. Amend. I ..... *passim*

Statutes

Cal. Bus. & Prof. Code § 17508.5 (West Supp. 1995) ..... *passim*

Other Authorities

A. France, *The Red Lily* (1894) 9n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1930

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., GROCERY MANUFACTURERS OF AMERICA, INC., THE SOAP AND DETERGENT ASSOCIATION, NATIONAL FOOD PROCESSORS ASSOCIATION, THE SOCIETY OF THE PLASTICS INDUSTRY, INC., AMERICAN FOREST & PAPER ASSOCIATION, THE AMERICAN ADVERTISING FEDERATION, THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, THE CALIFORNIA CHAMBER OF COMMERCE, and THE CHAMBER OF COMMERCE OF THE UNITED STATES,

Petitioners,

—v.—

DANIEL LUNGREN, in his official capacity as Attorney General of the State of California, CALIFORNIANS AGAINST WASTE, and the ENVIRONMENTAL DEFENSE FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

The petition and the briefs submitted in opposition to it make three propositions plain. First, there is no dispute about the national significance of this case or its centrality to the future of environmental advertising. Neither opposition brief takes

issue with the extraordinary level of interest voiced by states around the nation about the outcome of this litigation. (Pet. at 14)[1] Neither has quarrelled with the proposition that the determination of this case "is likely to shape the environmental claims all companies make for their products." (*Id.* at n.8)

Second, there is no dispute that the speech at issue in this case is truthful in its nature. According to California, "[b]y enacting § 17508.5, the legislature sought to prevent advertisements for products which, while they may be literally true, do not provide a meaningful environmental benefit." (Cal. Br. at 28) According to the 1993 EPA study attached to California's brief, "environmental advertising claims must be more than simply truthful in the information they relate." (*Id.* at 9Ra)

Petitioners believe that their First Amendment right to articulate "literally true" and "simply truthful" commercial speech may not be so easily overcome and that the criminalizing of such speech by California is well worthy of this Court's review. Neither California nor the intervenors deny the impact of the statute: it prevents the use by manufacturers and distributors of any of the environmental terms defined by California, however truthfully and precisely those terms are used, except as the legislature has determined. It is common ground, then, that California has barred manufacturers and distributors from accurately stating that their offerings are "recycled, 5% post-consumer waste." It is also common ground that critics of petitioners are free to use just such language about their own offerings—and that they do so. (*See* Pet. at 15)

Finally, there is no question that use of the words California has defined has sometimes led to public confusion and that some of the petitioners themselves have sought legislative guidance in the area. While no petitioner has ever sought leg-

---

[1] References to prior submissions to this Court are in the following form: Petition for A Writ of Certiorari ("Pet."); opposition brief of California's Attorney General ("Cal. Br."); opposition brief of the intervenors below, the Environmental Defense Fund and Californians Against Waste ("EDF Br.").

islation of the sort California has adopted, there is no issue as to the reality that the defined words have sometimes been used in a misleading fashion.[2]

That is but another way of saying that the ultimate disposition of this case will go far to determining the manner in which states may constitutionally balance the right of advertisers to speak truthfully against the authority of government to regulate or even ban speech that is no more than potentially misleading. *See Peel* v. *Attorney Registration & Disciplinary Commission*, 496 U.S. 91 (1990).[3]

---

[2] Even as to this, the magnitude of the problem is hardly as the opposition would have it. The State appends to its brief excerpts of a 1993 EPA study, issued over two years after the adoption of the statute at issue in this case. According to the study, in the entire nation from 1990-1992, a total of 49 proceedings were brought by public and private plaintiffs challenging the use of words in environmental advertising as misleading. Of these, only 25 involved claims using the words defined by California's statute; of those 25, the study reflects that in three cases, the manufacturer substantiated its claim. EPA, *Evaluation of Environmental Marketing Terms in the United States* EPA 741R-92-003 (Feb. 1993) ("1993 EPA Report") at 78-85.

The same EPA study concludes that "[t]he terms most commonly used by marketers, such as *recycled* and *biodegradable*, were also the most widely understood by survey respondents." (Cal. Br. at 10Ra)

[3] Cases cited by the intervenors (EDF Br. at 22 n.13) and the court below (Pet. 20a n.3) for the proposition that lower courts "have uniformly upheld" regulations such as those at issue here "against First Amendment challenges" do not begin to support any such proposition. *Kraft, Inc.* v. *FTC*, 970 F.2d 311 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1254 (1993) involved "an individualized F.T.C. cease and desist order, prohibiting a particular set of deceptive ads" rather than "a prophylactic regulation . . . completely prohibiting an entire category of potentially misleading commercial speech"; the case involved "a completely different animal" than that in this case. *Id.* at 317; *see also id.* at 325. *Bristol-Myers Co.* v. *FTC*, 738 F.2d 554, 557 (2d Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985) similarly involved an individual review of seven specific false and deceptive claims concerning "both the efficacy and the freedom-from-side-effects" of certain of its products. *United States* v. *General Nutrition, Inc.*, 638 F. Supp. 556, 562 (W.D.N.Y. 1986) upheld the prosecution under the Food, Drug and Cosmetic Act of a manufac-

At the same time, the case focuses on a particularly pernicious use of state power over speech: a determination by the State which favors one entire class of speakers—those who presume to speak for "nature"—over those who are routinely the subject of their criticism.

A. The Inconsistency of the California Statute with *Central Hudson*

Two subsections of the seminal articulation by this court of the commercial speech test set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980) are implicated by the case. As regards the requirement of *Central Hudson* that a state may not punish truthful and nonmisleading commercial speech in the absence of "affirmative" proof that the State's interest is "directly advanced" by the statute's restriction, the petition emphasized the irrationality of the statute establishing what this Court has referred to as a "unique and puzzling regulatory framework" that ensures that it will fail to achieve its end. *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1593 (1995). The petition cited, by way of example, the interpretation of the statute below which permitted manufacturers and distributors to tout the environmental benefits of their products so long as their statements were phrased

---

turer that misbranded its prescription drug; again, the case did not involve any broad prophylactic rules against the use of any specific language. *American Frozen Food Institute* v. *Mathews*, 413 F. Supp. 548, 555 (D.D.C. 1976), *aff'd per curiam*, 555 F.2d 1059 (D.C. Cir. 1977) upheld regulations applicable to frozen foods that the court concluded did not "proscribe truthful nonmisleading labeling and advertising."

Similarly, the opposition's references (Cal. Br. at 3 & n.2, n.3; EDF Br. at 21 & n.12) to statutes which are supposedly similar to that of California add little to this discussion. Statutes and regulations that define words such as "Annual Percentage Rate" and "Octane Rating" regulate words of measurement—far from those involved here—where standardization is necessary. As to governmental regulations of food labeling (*e.g.*, "low fat", "light") the opposition cites no case at all involving any constitutional challenge asserting a right to accurately provide *more* information than a particular definition includes.

"generally" enough. (Pet. at 18-19) The result, as the petition demonstrated, is wholly irrational: manufacturers like Del Monte may urge consumers to buy their products because of the "general" environmental attractiveness of the tin cans in which they are sold. An advertisement drafted in the singular and not the plural, however, may violate the statute. Just this sort of irrationality, the petition urged, led this Court in *Coors* to hold the statute there unconstitutional.

California has offered no response to this aspect of the statute. The intervenors have responded by claiming that the narrowing by the court below of the statute's applicability "underscores the reasonableness of the law" rather than creating "a constitutional infirmity." (EDF Br. at 11) We do not doubt that the statute would have been unconstitutionally overbroad if it criminalized the "generalized" speech engaged in by Del Monte. But that is hardly a constitutional defense of the statute after its rewriting by the lower courts. Any statute that permits Del Monte and other manufacturers and distributors to tout their products "generally" but not specifically is, by its nature, irrational to the point that it cannot withstand constitutional review. *Coors*, 115 S. Ct. at 1592-93; *see Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (striking down city regulation that banned commercial newsracks but allowed noncommercial newsracks where distinction between the two bore no relationship to the city's asserted interest in esthetics).

The same is true with respect to the emphasis in the opinion of the court of appeals on the proposition that other words might freely be used by manufacturers and distributors in place of the ones that the legislature so rigidly defined. The petition demonstrated that the freedom of commercial speakers to state that "this product contains x% [*reused/recaptured*] materials" at the same time they cannot use the word "recycled" negated any potential benefit of the statute. (Pet. at 19-20) The intervenors' opposition brief maintains that the legislature was not seeking "to police every environmental attribute claim" but only some of the ones "most commonly abused." (EDF Br.

at 11) The irrationality of the statute remains the same. If manufacturers and distributors are simply free to substitute the words "reused" or "recaptured" for "recycled", what possible benefit can the State claim it has accomplished? As for the State's defense of the statute, it complains that claims such as "NEW! DEGRADABLE!" "MAXIMUM DEGRADABILITY" and "ENVIRONMENTALLY DEGRADABLE" were "hurled at consumers in advertisements and on product labels throughout the country." (Cal. Br. at 8) Yet, Section 17508.5, which does not define any of the terms quoted above, leaves advertisers absolutely free to continue making such claims. How has the statute addressed the very problem described by the State?[4]

The failure of the State directly to address the arguments made in the petition and the inadequacy of the responses offered by the intervenors to these arguments are just as apparent in their treatment of the last *Central Hudson* factor: has the State affirmatively demonstrated that the statute is "narrowly tailored" and its costs "carefully calculated"? *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989); *Cincinnati*, 113 S. Ct. at 1510 & n.12.

In the course of demonstrating that there were several less restrictive alternatives to the statute, petitioners pointed to the significance of the position of the State below that, properly

---

[4] Both the State and the intervenors rely on conclusory (and to a considerable extent, illogical) arguments in the effort to establish that the statute "directly advances" its goals. The State, like the courts below, argues that "the legislature could conclude that there is an immediate connection between advertising and demand for the item advertised, and thus the advertising could be regulated to prevent deception." (Cal. Br. at 22) But any asserted link between advertising and *consumption* establishes nothing about how this statute's definitions of words help prevent *deception*. Similarly, the intervenors argue that i) California has a critical need for waste reduction; ii) recycling programs are vital to the State's efforts to reduce waste sent to landfills; iii) markets for recycled materials collected are not adequately developed; and iv) enhancing these markets is critical to the effort to reduce waste. (EDF Br. at 14) But again, none of this has anything to do with this statute's claimed connection to a better environment.

read, the statute should be understood to have "no application when the words are used in conjunction with modifiers which adequately dispel deception." (*See* Pet. at 23 & n.13) The centrality of this to the State's failure to meet its burden is plain. If the State was content with such a statute to accomplish its goals, it was plain that the legislature that enacted the far broader statute actually adopted had not " 'carefully calculated' the costs and benefits associated with the burden on speech imposed" by the statute. *Cincinnati*, 113 S. Ct. at 1510.

To this argument, as well, the State did not respond at all. Once again, the intervenors' reply is anything but responsive. According to them (but not the State), the State never stated that such a construction was "*compelled* by the First Amendment." (EDF Br. at 17) This is both misleading and irrelevant. The State did argue in the district court that its reading of the statute to allow qualifiers would avoid "raising doubts of the statute's constitutionality." (Docket No. 30 at 34) But beyond any First Amendment concerns, the State's whole theme was that the statute allowed qualifiers because the problem the legislature sought to address with the statute was "unqualified claims", terms used "alone" "unadorned" "without definition" "unexplained" or "standing on their own". (*Id.* at 13, 16, 22, 27, 31) Thus the State's position was that the statute simply did not cover, was not meant to cover, and should not be read as covering, situations in which "manufacturers and distributors choose to adequately explain in their advertisements and on their labels what they mean by the use of environmental terms." (*See* Pet. at 23 n.13)

The less speech-destructive alternatives relied upon in the petition, such as the FTC guidelines which themselves permit qualifying language in order to explain the context in which environmental terms are used, also remain untouched by the opposition briefs. The intervenors' reference, in their final footnote (EDF Br. at 22 n.14), to the fact that California is itself considering replacing § 17508.5 with regulations incorporating the FTC guidelines demonstrates with clarity that the

California legislature is well aware of this far less speech-restrictive legislative response in this area.

The petition referred, as well, to two other less speech-intrusive mechanisms. (Pet. at 24-25) One is the adoption of legislation directed not at speech but at whatever environmental flaws were thought to exist in petitioners' packaging, foods or the like. *See Coors* 115 S. Ct. at 1593-94 (availability of other options including direct regulation indicated that statute was more extensive than necessary, in violation of *Central Hudson*). Yet another alternative is the continuation of some sort of case-by-case approach such as California has already used. Again, the State offers no response except to quote the court below. And if the EPA study now proffered by the State is relevant at all, it is because it shows the effectiveness of a case-by-case approach; the study indicates that some challenged environmental claims have been voluntarily withdrawn, others have been substantiated, and still others resulted in no action by the complaining entity. 1993 EPA Report at 78-85. Certainly the study does not begin to justify the broad prophylactic prohibitions California has adopted.

Petitioners do not doubt that the "fit" the State must demonstrate need not be "necessarily perfect" or "the single best disposition." *Florida Bar* v. *Went For It, Inc.*, 63 U.S.L.W. 4644, 4648 (U.S. June 21, 1995). The existence of all these alternatives, however, amply demonstrates the inability of California "affirmatively" to demonstrate that its statute is "narrowly tailored" since a statute which disregards far less restrictive and more precise means of achieving its goals, by its nature, is not narrowly tailored. *Id.*; *Coors*, 115 S. Ct. at 1593-94; *Cincinnati*, 113 S. Ct. at 1510 & n.13.

B. The Inconsistency of the California Statute with *R.A.V.* v. *City of St. Paul*

Both the State and the intervenors maintain that Judge Noonan was incorrect in concluding that Section 17508.5 unconstitutionally distinguishes between the speech of petitioners

and their critics. Manufacturers and distributors, they maintain, are as free as the intervenors to engage in purely political debate; the intervenors are as limited by the statute as are manufacturers and distributors in their purely commercial discourse. There is thus no viewpoint distinction at all.

It is an argument Anatole France might have savored.[5] It is, after all, now undisputed that California critics of manufacturers or distributors are free to tout *their* environmental purity by asserting that their reports are published on "recycled paper, 5% of which is postconsumer waste" at the same time California manufacturers and distributors commit a crime when they accurately use the identical language about their offerings. (*See* Pet. at 15, 26) How, then, can it be seriously argued that the statute does not discriminate against one type of speaker in favor of another?

Similarly, there is no dispute that manufacturers and distributors are barred from urging upon prospective consumers that their products are "biodegradable within two years", however truthful that statement may be. But the intervenors are free, as part of their political agenda, to use the word "biodegradable" as they wish—including using it to denounce those who make environmental claims with which they disagree—*e.g.*, "products that are biodegradable within two years offer no real benefit to the environment."

In this context, it is no answer to Judge Noonan's conclusion of viewpoint discrimination to assert that manufacturers and distributors may freely participate in purely political debate about environmental issues. The arena in which they *choose* to speak about environmental issues most is the commercial marketplace. To conclude that when they do so, they are subject to the strictures of California law at the same time their critics are not surely puts form before substance in a manner facially

---

[5] "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." A. France, *The Red Lily* (1894).

inconsistent with this Court's determination in *R.A.V.* v. *City of St. Paul*, 112 S. Ct. 2538 (1992).[6]

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 21, 1995

Respectfully submitted,

Floyd Abrams*
80 Pine Street
New York, New York 10005
(212) 701-3000
**Counsel of Record*
for Petitioners

Of Counsel:
Susan Buckley
Katherine B. Harrison
Jonathan Donnellan
Cahill Gordon & Reindel
(a partnership including a
professional corporation)

---

[6] Judge Noonan's observations about the "powerful, evocative, almost sacred" use of the defined terms by the intervenors (Pet. at 31a-32a) is echoed by the intervenors' assertion in their brief that the "cost" of "exempting advertisements with qualifying language" is that the "informational significance of the term of art, standing alone, necessarily diminishes." (EDF Br. at p. 18 n.11) What the intervenors are really saying is that if petitioners were allowed to qualify the defined terms—*e.g.* "recycled, 5% postconsumer waste"—the defined words would no longer be sacred "shorthand". (*Id.* at 9)

SUPREME COURT, U.S.
FILED
JUL 26 1995
OFFICE OF THE CLERK

(5)

No. 94-1930

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., *et al.*,
Petitioners,

v.

DANIEL LUNGREN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: July 26, 1995

ZIPP

QUESTION PRESENTED

Amicus Washington Legal Foundation addresses the following question only:

May a state, consistently with the First Amendment to the Constitution, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading?

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 3

STATEMENT OF FACTS 2

REASONS FOR GRANTING THE WRIT 4

I. THE IMPORTANT COMMERCIAL SPEECH ISSUES RAISED BY THIS CASE MERIT COURT REVIEW, PARTICULARLY IN LIGHT OF THE CONFUSION THEY HAVE ENGENDERED WITHIN THE COURTS OF APPEALS . . . 4

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT 9

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases:

Abramson v. Gonzalez,
949 F.2d 1567 (11th Cir. 1992) 7-9
Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 13
Bd. of Trustees of State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 6, 7, 9-11
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980) . . *passim*
Edenfield v. Fane,
113 S. Ct. 1792 (1993) 15
Florida Bar v. Went For It, Inc.,
63 U.S.L.W. 4644 (U.S. June 21, 1995) 6, 14
In re R.M.J.,
455 U.S. 191 (1992) 13
Ohralick v. Ohio State Bar Ass'n,
436 U.S. 447 (1978) 14
Parker v. Commonwealth of Kentucky,
818 F.2d 504 (6th Cir. 1987) 8-9
Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 496 U.S. 91 (1990) 2, 8, 13
Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 9-12, 14
Rubin v. Coors Brewing Co.,
115 S. Ct. 1585 (1995) 2

Statutes:

California Business and Professions Code
§ 17508.5 . . . . . *passim*

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 94-1930

THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., *et al.*,
Petitioners,

v.

DANIEL LUNGREN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with more than 100,000 supporters nationwide, including many in California. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting the rights of individuals and businesses to speak freely on commercial matters. To that end, WLF has appeared before this Court

and other courts around the country in cases dealing with commercial speech rights. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, No. 94-1140, *cert. granted*, 115 S. Ct. 1821 (1995); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Pacific Gas and Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986).

WLF is concerned by the increased willingness of state and local governments, in the name of consumer welfare, to regulate the content of commercial speech. States undoubtedly have a strong interest in preventing consumers from being misled by fraudulent advertising. But WLF is very wary of government attempts to curb speech not for the purpose of preventing fraud but rather for the purpose of promoting a wide range of goals thought to be socially desirable -- such as increased recycling of resources. WLF believes that the interests of our free market economy -- as well as the demands of our Constitution -- are best served by permitting truthful commercial speech to flow freely. State and local governments that wish to promote worthy causes should do so by speaking out themselves, not by preventing others from speaking.

WLF submits this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court. WLF's brief is timely filed under Rule 37.2, in that it is being filed within the time allowed for filing briefs in opposition to the Petition.

STATEMENT OF FACTS

In the interests of judicial economy, WLF hereby adopts the Statement of the Case contained in the Petition.

In brief, this Petition involves a challenge to a California statute that limits the rights of manufacturers and distributors to describe their products as "ozone friendly," "biodegradable," "photodegradable," "recyclable," or "recycled." They are expressly barred from describing their products in those terms unless the products meet specific definitions established by the California state legislature. *See* California Business and Professions Code § 17508.5.

As the district court noted, § 17508.5 forbids the use of these five terms -- except in the manner approved by the legislature -- even in situations where their use is entirely accurate (Pet. App. 50a) or where the speaker's precise meaning in using the terms is explained to consumers in the labeling or advertising of the product. Pet. App. 51a-52a. Indeed, § 17508.5 takes no cognizance of whether consumers are misled or confused by the terms but, rather, strictly forbids their use without regard to context.

Petitioners filed suit in the U.S. District Court for the Northern District of California in February 1992, alleging *inter alia* that § 17508.5 violated their First Amendment rights by impermissibly restricting speech. In a December 1992 opinion granting summary judgment to Respondents, the district judge held that § 17508.5 violated no First Amendment rights. Pet. App. 34a-59a.[1] The court held that § 17508.5 imposed restrictions on commercial speech only and that the statute should be upheld under the test for

---

[1] The district court did, however, strike down (on due process grounds) the prohibition against use of the word "recyclable," on the basis that § 17508.5's definition of that term was overly vague. Pet. App. 57a-58a. Respondents did not appeal from that portion of the district court's decision.

commercial speech restrictions established by *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980). Pet. App. 38a-53a.

On appeal, a divided panel of the U.S. Court of Appeals for the Ninth Circuit affirmed. Pet. App. 1a-33a. The appeals court identified two "substantial" interests asserted by California in support of its speech restrictions: a desire to regulate potentially misleading speech and to promote resource conservation. Pet. App. 16a. The court held that § 17508.5 directly advanced those interests (*id.*, 16a-22a) and that the statute was narrowly tailored, in that California could not have accomplished its purposes in a far-less-restrictive manner. *Id.*, 22a-25a. Petitioners seek review of the Ninth Circuit's decision in this Court.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT COMMERCIAL SPEECH ISSUES RAISED BY THIS CASE MERIT COURT REVIEW, PARTICULARLY IN LIGHT OF THE CONFUSION THEY HAVE ENGENDERED WITHIN THE COURTS OF APPEALS

This case raises an issue of exceptional importance -- the circumstances under which the government may impose a total ban on truthful but *potentially* misleading commercial speech. This is an issue on which the federal appeals courts are divided. The Ninth Circuit held in this case that a total ban is permissible in order to guard against potentially misleading speech, even when the government could also accomplish its purposes in a manner less burdensome on First Amendment rights -- such as by imposing disclaimer requirements in order to eliminate any possibility that listeners could be misled. Pet. App. 22a-25a. The

Sixth and Eleventh Circuits have reached contrary conclusions. The Court should grant the writ in order to resolve this conflict.

This case is a particularly appropriate vehicle for resolution of the conflict because of the extraordinary level of national attention it has received. California's near-ban on use of four words used in connection with "green" advertising[2] followed closely on the heels of an investigation into allegedly deceptive "green" advertising, conducted by an ad hoc Task Force of State Attorneys General. Other states have monitored these proceedings closely, and the States of Massachusetts, Minnesota, Tennessee, and Washington appeared as *amici curiae* in the Ninth Circuit in support of California. The pendency of this suit has placed on hold efforts by other states to impose similar restrictions on "green" advertising, but it is generally understood that those efforts will go forward if the California statute is upheld. *See, e.g.*, Brief in Opposition of Respondents Californians Against Waste and the Environmental Defense Fund (the "EDF Respondents") at 7 ("other states [are] poised to decide what form of regulation to adopt to address the same problems as those plaguing California"). Thus, the limits on a state's power to control "green" advertising is an issue of overriding significance throughout the nation; in light of the important First Amendment values at stake, delay in bringing the issue before the Court would serve no useful purpose.

---

[2] "Green" advertising is the name generally ascribed to advertising that seeks to promote products based on their environmental attributes. Such advertising proceeds from the assumption that consumers are willing to pay more for a product thought to be "friendlier" to the environment than competing products.

The conflict between the decision in this case and decisions of the Sixth and Eleventh Circuits centers on the third and final prong of the *Central Hudson* test: whether a regulation of commercial speech is narrowly tailored to serve its intended purpose.[3] The Court has made clear that a regulation can pass muster under *Central Hudson*'s third prong even if it is not the least restrictive measure that could effectively protect the government's interest. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 476-77 (1989). Rather, *Central Hudson* requires that there be a "reasonable" fit between the regulation and its intended purpose; that the regulation be "in proportion to the interest served" and employ a means "narrowly tailored" to achieve the desired objective. *Fox*, 492 U.S. at 480. Left unresolved by *Fox* was an issue squarely raised by this case: whether a total ban on speech can qualify as a "narrowly tailored" regulation where the state's interests can be fully served in a far-less-drastic manner -- such as by imposing disclaimer requirements on the speaker.

The Ninth Circuit decided that issue by upholding the total ban. It held that product manufacturers and producers could be absolutely prohibited from promoting their products through use of the words "ozone friendly," biodegradable," "photodegradable," and "recycled," unless the products met stringent requirements set forth in § 17508.5.

---

[3] Under the three-pronged *Central Hudson* test, government may regulate commercial speech (*i.e.*, speech that proposes a commercial transaction) that neither is false nor concerns an unlawful activity *only* if: (1) it asserts a substantial interest in support of its regulation; (2) it demonstrates that the restriction on commercial speech "directly and materially advances" that interest; and (3) the regulation is narrowly drawn. *Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644, 4646 (U.S. June 21, 1995).

Pet. App. 22a-25a. The appeals court dismissed Petitioners' more narrowly drawn alternative: a regulation mandating qualifying language to clarify use of the regulated terms not conforming with § 17508.5.[4] The Ninth Circuit did not dispute that Petitioners' suggested alternative would adequately serve California's asserted interests, but held nonetheless that the existence of that alternative did not in any way suggest that § 17508.5 flunked the third prong of the *Central Hudson* test.

The Eleventh Circuit reached the opposite conclusion in *Abramson v. Gonzalez*, 949 F.2d 1567 (11th Cir. 1992). Under challenge in *Abramson* was a Florida statute that prohibited unlicensed psychologists from advertising their services using the word "psychologist" -- even though unlicensed psychologists were free under Florida law to practice their profession. The Eleventh Circuit recognized that it was potentially misleading for the plaintiffs to hold themselves out as "psychologists" because a consumer might be led to believe that they were licensed as such by the state. The appeals court nonetheless held that, under *Fox*, Florida's ban on use of the word "psychologist" could not qualify as a narrowly tailored regulation of commercial speech -- because a much more narrowly tailored regulation (requiring the plaintiffs to disclose their unlicensed status) would fully satisfy Florida's concerns about the potentially misleading nature of the speech. *Abramson*, 949 F.2d at 1575-77. The court held, "[A]lthough a state may prohibit

---

[4] Petitioners suggested, for example, that a manufacturer be permitted to advertise that one of its product consists of "100% recycled paper, 5% of which is post-consumer waste" if that statement is true. Under § 17508.5, the word "recycled" may never be used in connection with a product unless the product contains "at least 10 percent, by weight, postconsumer material."

misleading advertising entirely, it *may not place an absolute prohibition on potentially misleading information if the information may also be presented in a way that is not deceptive.*" *Id.* at 1576 (citing *Peel*, 496 U.S. at 103) (emphasis in original).[5]

The decision below also conflicts with a Sixth Circuit decision, *Parker v. Commonwealth of Ky.*, 818 F.2d 504 (6th Cir. 1987). *Parker* struck down a Kentucky law that barred general dentists from holding themselves out as specialists in fields (such as orthodontics, oral surgery, and periodontics) in which they were permitted to perform specialized services. The Sixth Circuit held that the ban was not "narrowly tailored" because even though consumers might mistakenly conclude that general practitioners were licensed as specialists in orthodontics:

> It is . . . evident that these terms [such as "orthodontics"] and the information they convey can be presented in a way which does not mislead the public into believing that a general practicing dentist is a dentist with an orthodontia specialty license. A disclaimer to such an effect would adequately address the state's concern.

---

[5] Just as a manufacturer could avoid § 17508.5's speech ban by altering the composition of its products in order that they might come within the statute's definitions of "recycled," etc., so too the plaintiffs in *Abramson* could have avoided Florida's prohibition on use of the word "psychologist" by obtaining psychology licenses from the state. The existence of that method by which to avoid the Florida statute's absolute ban on commercial speech did not, however, affect in any way the Eleventh Circuit's conclusion that the ban was not "narrowly tailored" for purposes of First Amendment analysis.

Parker, 818 F.2d at 510-11. The court added, "To prefer more disclosure over an outright ban on particular forms of advertising not only protects the advertiser's right to communicate, but also protects the general public's interest in receiving information." *Id.* at 509.[6]

In sum, the Ninth Circuit's decision is in irreconcilable conflict with *Abramson* and *Parker*. The latter two cases hold -- contrary to the Ninth Circuit's decision -- that a ban on potentially misleading speech can never constitute a "narrowly tailored" means of regulating the speech so long as the government's interest in guarding against misleading speech can be vindicated through required use of disclaimers. The Court should grant the writ to resolve that conflict, as well as to address an issue of significant national importance.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT

The petition for a writ of certiorari should be granted for the additional reason that the Ninth Circuit's decision conflicts with numerous decisions of this Court with regard to what constitutes a "narrowly tailored" regulation under the *Central Hudson* test.

---

[6] Admittedly, *Parker* was decided two years before *Fox*, the Supreme Court decision which sets forth in greatest detail what constitutes a narrowly tailored regulation for purposes of the *Central Hudson* test. Nonetheless, nothing in *Parker* is inconsistent with *Fox*. Moreover, *Parker* was decided one year after (and cites to) *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the commercial speech decision upon which the Ninth Circuit most heavily relied in determining that § 17508.5 was narrowly tailored. *See* Pet. App. 24a.

In support of its assertion that § 17508.5's outright speech ban is a "narrowly tailored" remedy despite the existence of significantly narrower alternatives, the appeals court argued:

> The second suggested alternative, a statute requiring "more speech", runs headlong into the Court's rejection of such an approach to fourth prong analysis in *Fox*, 492 U.S. at 479. As Justice Scalia observed for the majority in *Fox*,
>
> > In *Posadas*, for example, where we sustained Puerto Rico's blanket ban on promotional advertising of casino gambling to Puerto Rican residents, we did not first satisfy ourselves that the governmental goal of deterring casino gambling could not adequately have been served (as the appellant contended) 'not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it.'
>
> [*Fox*, 492 U.S. at 479], *quoting Posadas*, 478 U.S. at 344 (emphasis in original).

Pet. App. 24a.

The Ninth Circuit's argument takes Justice Scalia's statement completely out of context and overlooks significant distinctions between *Posadas* and this case that render *Posadas* wholly inapplicable to this case.

The quotation from *Fox* was pulled from a lengthy section of the opinion in which Justice Scalia was attempting to demonstrate that the Court's previous commercial speech

cases could not reasonably be read as limiting the definition of a "narrowly tailored" remedy (for *Central Hudson* purposes) to ones employing the "least restrictive means." *See Fox*, 492 U.S. at 475-481. The Court reviewed a long series a commercial speech decisions to support that conclusion; the quoted reference to *Posadas* appeared in roughly the middle of that series. The reference was nothing more or less than one more piece of evidence that *Central Hudson* did not incorporate a "least restrictive means" requirement. *Id.* at 479.

Contrary to the impression left by the Ninth Circuit, Justice Scalia's discussion of *Posadas* was not a "rejection" of Petitioners' argument that the existence of significantly more narrowly tailored alternatives to a total ban on speech demonstrates that the ban is not "narrowly tailored." *Fox* was an attempt to provide a workable, general definition of a "narrowly tailored" commercial speech regulation, not an attempt to determine precisely when and under what conditions a total ban on speech can constitute a "narrowly tailored" regulation.

Moreover, nothing in *Posadas* itself supports an argument that § 17508.5's absolute ban on speech is a narrowly tailored speech regulation. *Posadas* involved a challenge to a Puerto Rican law that prohibited Puerto Rican casinos from directing their advertisements to island residents; the law was designed as a means of reducing demand for gambling. The Court rejected the plaintiff's claim that this blanket ban was not narrowly tailored and that Puerto Rico should instead be forced to seek to accomplish its objectives by promulgating speech designed to discourage gambling. *Posadas*, 478 U.S. at 344. The Court said it would defer to the decision of the Puerto Rico legislature that government-mandated advertisements spotlighting the dan-

gers of gambling would not succeed in reducing demand, that "residents of Puerto Rico are already aware of the risks of casino gambling, yet would nonetheless be induced by widespread advertising to engage in such potentially harmful conduct." *Id.*

The crucial distinction between *Posadas* and the instant case involves the differing rationales underlying the government speech restrictions in the two cases. The restriction in *Posadas* involved an attempt to reduce demand for gambling, while the principal rationale underlying § 17508.5 is a desire to avoid potentially misleading speech.[7] *Posadas* upheld a blanket ban on speech as a "narrowly tailored" regulation on the very reasonable assumption that no amount of compelled speech regarding the evils of gambling would serve to counteract the social problems that would be created if casinos were permitted to advertise to island residents. But the Court

---

[7] California also asserts an interest in using § 17508.5 to promote its environmental goals. The theory apparently is that manufacturers will begin producing more environmentally "friendly" products in reaction to § 17508.5, so that they will be permitted to include the otherwise-prohibited "green" words in their advertising. Suffice to say that Respondents have provided absolutely no evidence that manufacturers will react in this manner. It is far from obvious that they would do so. One would expect manufacturers to change the composition of their products in reaction to § 17508.5 only if the costs of such changes would be exceeded by the sales increases expected to be brought about through "green" advertising. Given the large costs usually associated with any change in a product's composition, it is far more likely that manufacturers would react by dropping their "green" advertising altogether or by resorting to use of environmental terms not covered by § 17508.5. Neither reaction would serve to promote California's environmental goals; indeed, the likely effect would be to decrease the quantity of pro-environment information being disseminated by manufacturers.

has *never* upheld a blanket ban as a "narrowly tailored" means of regulating speech whose only vice is that it is *potentially* misleading.

To the contrary, in case after case, the Court has held that a blanket speech ban is not a narrowly tailored means of regulating potentially misleading speech when disclaimer requirements can serve to eliminate any possibility that consumers will be misled. For example, in *Peel*, the Court rejected Illinois's attempts to ban all mention from an attorney's letterhead that he had been certified as civil trial specialist by the National Board of Trial Advocacy. While the Court agreed with Illinois that such information was potentially misleading, the Court said that the blanket ban was not narrowly tailored in light of evidence that a disclaimer requirement could eliminate all possibility of confusion. *Peel*, 496 U.S. at 106-109 (plurality opinion); *id.* at 111 (Marshall, J., concurring in the judgment).

Similarly, in *In re R.M.J.*, 455 U.S. 191 (1992), the Court struck down an effort to prohibit truthful attorney advertising in a Yellow Pages listing. The Court said, "States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of practice areas, if the information may also be presented in a way that is not deceptive." *In re R.M.J.*, 455 U.S. at 203. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the decision that established attorneys' First Amendment right to advertise, the Court explained that "the preferred remedy [for potentially misleading speech] is more disclosure rather than less." *Bates*, 433 U.S. at 375. While prohibiting Arizona from imposing a blanket ban on all attorney advertising, the Court explained that states were still free to require "some limited supplemen-

tation, by way of warning or disclaimer or the like, . . . so as to assure the consumer is not misled." *Id.* at 384.

In every case in which the Court has found that a blanket ban on some type of speech was, in fact, narrowly tailored, the interest asserted by the government was something other than a desire to prevent potentially misleading speech. In *Posadas*, the government interest was in reducing demand for gambling; in *Florida Bar*, it was a desire to protect the privacy of accident victims and to improve the image of attorneys; in *Ohralick v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), a blanket ban on in-person solicitations by attorneys was upheld as a means of protecting consumers from overbearing attorneys.

It is conceivable, of course, that there might be a case in which even an extensive disclaimer requirement would be insufficient to guard against potentially misleading speech. In such a case, a blanket ban on the potentially misleading speech might constitute a "narrowly tailored" regulation for *Central Hudson* purposes. Suffice to say that this is not such a case; we do not understand Respondents to contest that disclaimer requirements could eliminate all potential that consumers would be misled by green advertising. If, as proposed by Petitioners, they are permitted to advertise that their products are "recycled, 5% of which is post-consumer waste," there is very little likelihood of confusion.

Finally, we are unpersuaded by Respondents' reliance on other regulatory schemes which impose standardized definitions on certain terms such as "finance charge" and "Annual Percentage Rate." *See, e.g.*, California Brief at 3. Such regulatory schemes are clearly distinguishable from § 17508.5. They generally require that information

be formatted in a particular manner in order to reduce confusion; they do not forbid regulated firms from speaking altogether on certain subjects. No credit card company is forbidden from conveying its "Annual Percentage Rate"; no food distributor is forbidden from including nutritional information on labels. In contrast, California absolutely forbids manufacturers from discussing the "recycled" content of their products, except under very limited circumstances. A statute standardizing use of the term "recycled" (*e.g.*, specifying that the percentage of post-consumer material is to be based on weight, not on volume) would be unobjectionable, but that is a far cry from a statute that (as here) in many cases prohibits advertising regarding the percentage of post-consumer waste.

In sum, WLF requests that the court grant the writ in order to correct the Ninth Circuit's significant departure from this Court's commercial speech jurisprudence, particularly with respect to what constitutes a narrowly tailored regulation.[8]

---

[8] WLF fully supports Petitioners' argument that the Ninth Circuit also departed from settled case law in determining that § 17508.5 passes the second prong of the *Central Hudson* test: the requirement that the government regulation directly *and materially* advance the government's asserted interest. Petitioners have well documented the essentially irrational nature of the § 17508.5 scheme. We note that in addressing the second *Central Hudson* prong, the Ninth Circuit failed acknowledge recent Supreme Court case law underscoring that the government bears a significant burden in coming forward with evidence of direct and material advancement of the government's interest. *See, e.g., Edenfield v. Fane* , 113 S. Ct. 1792, 1798 (1993).

CONCLUSION

WLF respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Counsel for *amicus curiae*

Dated: July 26, 1995

Counsel wish to acknowledge the assistance of Dennis Chong, a second-year student at American University's Washington College of Law, in preparing this brief.